EXTRACTS FROM TRANSCRIPT OF R

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 751.

THE ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI AT THE RELATION OF EDWIN G. MERRIAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED JULY 11, 1904.

(15,635.)

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(Record, page 1.)

The President of the United States to the honorable the judges of the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you at the April term, 1894, thereof, in the matter of The State of Missouri at the relation of Edwin G. Merriam, relator, against Alexander Ross, judge of the Cape Girardeau court of common pleas; The St. Louis, Cape Girardeau and Fort Smith Railway Company; Louis Houck, president of said railway company, as well as pretended receiver of all the assets thereof, under appointment of the said judge of said court of common pleas; Leo Doyle; The Mercantile Trust Company, a corporation, and Edward Hidden, respondents, a manifest error hath happened, to the great damage of the said The St. Louis, Cape Girardeau and Fort Smith Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., within thirty days from the signing the citation in this cause, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this sixth day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Issued at office, in the city of Jefferson, with the seal of the circuit court of the United States for the western district of Missouri, central division, dated as aforesaid.

[SEAL.]

H. G. GEISBERG,
Clerk Circuit Court of the United States,
Western District of Missouri, Central Division.

Allowed by Francis M. Black, chief justice, this 13th June, 1894.

Return to Writ.

UNITED STATES OF AMERICA, }
Western District of Missouri, } ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said supreme court, at the city of Jefferson, this 29th day of June, A. D. 1894.

[SEAL.] JNO. R. GREEN, *Clerk.*

This writ to operate as a supersedeas.
June 13th, 1894.

FRANCIS M. BLACK,
Chief Justice.

(Endorsed:) No. —. United States circuit court, western district of Missouri, central division. State of Missouri *ex rel.* Edwin G. Merriam, relator, *vs.* Alex. Ross, judge, etc., *et al.*, respondents. Writ of error to supreme court of the State of Missouri. Returned and filed —. Filed Jun- 18, 1894. Jno. R. Green, clerk.

(Record, page 2.)

The United States of America to the State of Missouri at the relation of Edwin G. Merriam, relator, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., within thirty days from and after signing this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein The St. Louis, Cape Girardeau and Fort Smith Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis M. Black, chief justice of the supreme court of the State of Missouri, this 13th day of June, in the year of Lord one thousand eight hundred and ninety-four.

FRANCIS M. BLACK,
Chief Justice.

UNITED STATES OF AMERICA,
Western District of Missouri, } *ss:*

I hereby acknowledge due service of the within citation this 21st day of June, A. D. 1894.

H. S. PRIEST,
Attorney for Defendant in Error.

(Endorsed:) Supreme court of Missouri. State of Missouri *ex rel.* Edwin G. Merriam, relator, *vs.* Alex. Ross, judge, etc., *et al.*, respondents. Citation. Filed 1894. Filed Jun- 18, 1894. Jno. R. Green, clerk.

(Record, page 3.)

THE ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM, Defendant.

Error to the supreme court of the State of Missouri.

Now, on the second Monday of October, A. D. 1894, before the justices of the Supreme Court of the United States, at the city of Washington, D. C., at the October term of said court, 1894, comes The St. Louis, Cape Girardeau & Fort Smith Railway Company, plaintiff in error, and says that in the record and proceedings in the said supreme court of Missouri in said action below, wherein The State of Missouri on the relation of Edwin G. Merriam is plaintiff and Alexander Ross, judge, and others are defendants, there is manifest error in this, to wit:

I.

That by the order, action, and judgment rendered in said cause said St. Louis, Cape Girardeau & Fort Smith Railway Company, here plaintiff in error, has been by the State of Missouri deprived of its property without due process of law and denied the equal protection of the laws within its jurisdiction in violation of the first section of the fourteenth amendment of the Constitution of the United States.

II.

That the supreme court of the State of Missouri was without jurisdiction or authority to adjudge and command that the property of said St. Louis, Cape Girardeau and Fort Smith Railway Company, here plaintiff in error, should be turned over to any person or officer other than said railway company, and in so ordering and adjudging in said action said supreme court condemned said railway company without hearing as to its property and its right of possession thereof, proceeded without inquiry as to the same, and rendered judgment without trial and deprived said railway company of its property without due process of law.

III.

That the supreme court of Missouri, by its judgment that said Houck should turn over all the property of said railway company that had come into his hands under the orders of said common pleas court of Cape Girardeau county, and denying to said common pleas court any jurisdiction whatever in said action, either under the original or amended petitions filed therein or the cross-petition or bill filed therein by Leo Doyle, the State of Missouri denied to said railway company the equal protection of the laws within its jurisdiction.

IV.

That the supreme court of Missouri by its judgment and order that said Houck should turn over all the property of said railway company that had come into his hands under the orders of said common pleas court of Cape Girardeau county to the receiver that had been or might be appointed by the circuit court of Stoddard county. It appearing in and by said record that said railway company, here plaintiff in error, had tendered to said Merriam, relator, plaintiff in said circuit court of Stoddard county, the full amount of his debt as claimed in said action by him brought in said circuit court, said railway company was denied the equal protection of the laws of the State of Missouri within its jurisdiction.

V.

That the supreme court of the State of Missouri by commanding the said Houck to turn over all the property of said railway company that had come into his possession under the orders of said common pleas court of Cape Girardeau county to any receiver who had been or might be appointed by the circuit court of Stoddard county deprived said railway company of its property and the possession of its property without due process of law and in violation of the fourteenth amendment of the Constitution of the United States.

VI.

That by the judgment of the supreme court of Missouri in said cause it has been ordered and adjudged that the property of said railway company, here plaintiff in error, shall be turned over to a receiver by said judgment declared to be *de jure*, when, as by said record appears, so to judge and declare is to deprive said railway company of its property without due process of law, to deny it the equal protection of the laws within the jurisdiction of said State and against said fourteenth amendment.

Wherefore the said St. Louis, Cape Girardeau and Fort Smith Railway Company, plaintiff in error, prays that the order and judgment of said supreme court of the State of Missouri be reversed and it be ordered to vacate said order and judgment by it rendered.

JOHN W. NOBLE,
M. R. SMITH,
GEO. D. REYNOLDS,
Attorneys for Plaintiff in Error.

(Endorsed:) S. Louis, Cape Girardeau & Ft. Smith Railway Company, plaintiff in error, *vs.* State of Missouri on the relation of Edwin G. Merriam, defendant. Assignment of errors. Filed June 15th, 1894. Jno. R. Green, cl'k.

(Record, page 7.)

Be it remembered that heretofore, to wit, on the 20th day of July, 1893, there was filed in the supreme court of Missouri a petition for prohibition in a certain cause wherein The State of Missouri at the relation of Edwin G. Merriam was relator and Alexander Ross, judge of the Cape Girardeau court of common pleas, *et al.* were respondents; which said petition *in* in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas; The St. Louis, Cape Girardeau & Fort Smith R'y Co.; Louis Houck, President of said Railway Company, as Well as Pretended Receiver of All of the Assets Thereof, under Appointment of the said Judge of the said Court of Common Pleas; Leo Doyle, The Mercantile Trust Company, a Corporation, and Edward Hidden, Respondents.

Suggestions for Writ of Prohibition.

To the honorable supreme court of the State of Missouri:

Comes now Edwin G. Merriam and gives the said court here to understand and be informed—

That the St. Louis, Cape Girardeau & Fort Smith Railway Company is a railway corporation, duly organized as such under the laws of the State of Missouri, and owned and had, prior to the 4th day of March, 1893, operated a line of railway extending from the city of Cape Girardeau, in the county of Cape Girardeau and State of Missouri, thence in a southwesterly direction into and through the county of Stoddard, thence into and through the county of Wayne, and thence into the county of Carter, as far as the town of Hunter therein, being in length about 93 miles, and all in the State of Missouri.

Your petitioner would further respectfully show that the said railway company was originally organized under the laws of the State of Missouri by the name and style of the Cape Girardeau Railway Company, and that afterwards its name was changed to that of the Cape Girardeau & Southwestern Railway Company, and that again its name was changed from the latter to its present form of the St. Louis, Cape Girardeau & Fort Smith Railway Company.

Your petitioner further respectfully show- that on September 1st, 1880, the said railway company made to Leo Doyle, as trustee, its certain mortgage of that date to secure an issue of its bonds, in number one hundred, of the denomination of one thousand dollars each, upon this part of its road between the cities of Cape Girardeau and Delta, and that on July 18th, 1881, the said

company made to Leo Doyle, as trustee, its mortgage to secure an issue of 170 of its bonds, one hundred of which are of the denomination of one thousand dollars each, on that part of its line between Delta and Lakeville, in the county of Stoddard, a distance of about ten or eleven miles; and that the said railway company, on May 27th, 1882, make to Leo Doyle, as trustee, its mortgage to secure two hundred bonds, of the denomination of one thousand dollars each, upon that part of its road between Lakeville and the St. Francois river, and that on May 26th, 1888, the said railway company made to the Mercantile Trust Company, as trustee, its mortgage to secure an issue of one thousand bonds, of the denomination of one thousand dollars each, upon its entire road from Cape Girardeau to Hunter, in the county of Carter, for the purpose of exchanging said bonds for those theretofore issued and secured by the aforesaid mortgages and for the purpose of extending said railway from the St. Francois river to said town of Hunter.

Your petitioner would further represent that he is the holder of twenty-seven thousand of the one hundred thousand dollars of bonds issued under and secured by the said mortgage of September 1st, 1880, made by the said railway company, and 49,200 dollars of the eighty thousand dollars of bonds issued by the said railway company and secured by the said mortgage dated July 18th, 1881.

Your petitioner would further respectfully make known unto your honors upon information and belief that the remainder of the said bonds issued under the said two mortgages have been exchanged for the bonds of the said railway company issued and secured by the mortgage to the Mercantile Trust Company dated 26th of May, 1888.

Your petitioner further avers that, default having been made for more than a year prior thereto in the payment of that semi-annual installment interest coupons attached to said bonds, he did, on the 3rd day of March, 1893, file the following bill in behalf of himself and all others similarly situated and against said railway company, Leo Doyle, and the Mercantile Trust Company, to wit:

"STATE OF MISSOURI, }
County of Stoddard. }

In the Circuit Court, September Term, 1893.

E. G. MERRIAM, Plaintiff,
vs.
ST. LOUIS, CAPE GIRARDEAU & FORT SMITH RAILWAY COMPANY; Leo Doyle, Trustee, and The Mercantile Trust Company of New York, Trustees, etc., Defendants.

The complainant herein bringing this suit for himself as well as for all others similarly situated avers that the St. Louis, Cape Girardeau & Fort Smith Railway Company is a corporation duly organized pursuant to the laws of the State of Missouri and is the owner and in possession of a line of railway extending from the

city of Cape Girardeau, in the county of Cape Girardeau, in a southwesterly direction, thence into and through the county of Wayne, and thence into the county of Carter, terminating at the town of Hunter, with a branch line from Brownwood, in Stoddard county, to Zelma, in Bollinger county; that the defendant Leo Doyle is a resident of the county of Cape Girardeau and State of Missouri, and that the defendant The Mercantile Trust Company is a corporation duly organized under and by virtue of the laws of the State of New York and is a citizen of said State; and the plaintiff, further complaining, avers that said St. Louis, Cape Girardeau and Fort Smith Railway Company was first organized as a corporation under the said laws of the State of Missouri on or about August 10th, 1880, under the name and style of the Cape Girardeau Railway Company, and that on or about November 28th, 1881, its said corporate name was changed from that to the Cape Girardeau Southwestern Railway Company, and that subsequently, on or about June 3rd, 1891, its said corporate name was changed to the present one of the St. Louis, Cape Girardeau & Fort Smith Railway Company.

Compl-inant further avers that the Cape Girardeau R'y Co., the predecessor of the defendant railway company, on the 1st day of September, 1880, having authority so to act, made and duly executed under its seal its certain deed of trust or mortgage of that date, whereby it conveyed to the defendant Leo Doyle the following described premises, to wit, all and singular the railroad of said company as the same was then constructed and was being constructed from the city of Cape Girardeau, county of Cape Girardeau, State of Missouri, to a connection with the St. Louis, Iron Mountain & Southern Railway Company, in said county of Cape Girardeau and State aforesaid, a distance of about fifteen miles, together with all rights of way, depot grounds, railway engines, rolling stock, and other property appertaining to said railway, now owned, then owned, possessed, or acquired, or thereafter to be owned, possessed, or acquired, as well as all the lands and real estate then owned by said company or thereafter acquired, together with all and singular the right, rights, privileges, corporate property, and franchises of said railway company, and all appurtenances to the above-described premises belonging and in anywise appertaining, a more particular description of which is contained in said mortgage, a copy of which is hereto attached and made part hereof, as fully as though the same was herein set forth literally.

And compl-inant further says that said conveyance was in trust to secure the payment of certain indebtedness on the part of said defendant railway company, being evidenced by one hundred bonds of one thousand dollars each, and numbered from one to one hundred, inclusive, aggregating the sum of one hundred thousand dollars, payable to bearer on the 1st day of September, 1900, at the National Bank of Commerce, in the city of New York and State of New York, with interest thereon from the first day of September, 1880, at the rate of six per cent. per annum, for value received, interest payable semi-annually at said National Bank of Commerce, in the city of New York, upon the first days of March

and September, in each and every year, upon the presentation and surrender of the coupous annexed to said bonds, a copy of which bonds is set forth in the mortgage hereinbefore referred to.

Compl-inant further avers that the defendant, under the name of the Cape Girardeau R'y Co., pursuant to authority in that behalf and in conformity therewith, executed, under its seal, on the 18th day of July, 1881, to the defendant Leo Doyle its certain other mortgage, whereby it conveyed to said Doyle the following-described property and premises, to wit, all and singular its said railroad, as the same was then constructed or being constructed from Delta, on the Belmont branch of the St. Louis, Iron Mountain & Southern Railway Company, to a point at or near Lakeville, in Stoddard county, Missouri, a distance of ten or eleven miles, together with all rights of way, depot grounds, railways fences, bridges, station-houses and other buildings, engine-houses, machine shops, and all engines, rolling stock, or other property appertaining to said railway, then owned, possessed, or acquired or thereafter to be owned, possessed, or acquired, together with all land and real estate which said company then owned or may acquire, together with all and singular the rights, privileges, and corporate property and franchises of said railway company, and all appurtenances to the said described premises belonging or in anywise appertaining, a more particular description of which property is set forth in a copy of the mortgage hereto attached and marked Exhibit "B," and which is made a part hereof as fully as though the same were set forth herein *in extenso*.

Plaintiff says that said last-named conveyance was in trust to secure the payment of certain indebtedness on the part of said railway company, which is evidenced by its one hundred and seventy bonds of that date, of two series respectively, series A and series B, series A being numbered consecutively from one to seventy and each for the sum of one thousand dollars, and series B being numbered consecutively from one to one hundred, each for the sum of one hundred dollars, payable to bearer on the first day of September, 1901, at the National Bank of Commerce, in the city of New York, State of New York, with interest thereon from the first day of September, A. D. 1881, at the rate of 6% per annum, for value received, interest payable semi-annually at the said National Bank of Commerce, in the said city of New York, upon the 1st day of March and September in each and every year, upon the presentation and surrender of interest coupons attached to said bonds.

Plaintiff avers that he is the owner and holder of twenty-seven of the said bonds so secured by the said mortgage of September 1st, 1880, each for the sum of one thousand dollars, and forty-eight of the bonds of series A of the said mortgage of July 18, 1881, each for the sum of one thousand dollars, numbered from one to forty, inclusive, and of twenty of series B of the said bonds secured by the said mortgage of July 18, 1881, each for the sum of one hundred dollars and numbered from fifty-eight to sixty-two, inclusive, and seventy-nine to eighty-five, inclusive, together with the interest coupons matured as hereinafter stated.

Plaintiff further avers that the defendant, the railway company, under the name of The Cape Girardeau Southwestern Railway Company, on the 1st day of December, A. D. 1885, executed under its seal to the defendant Leo Doyle, as trustee, its certain deed of trust whereby it conveyed to said Doyle, amongst other property and subject to the conveyances hereinbefore set forth, the same property as that embraced in the said conveyance of September 1, 1880, and July 18, 1881, for the purpose of securing an indebtedness evidenced by two hundred and fifty bonds of one thousand dollars each, therein named series D, and numbered from one to two hundred and fifty, inclusive, and two hundred bonds of the denomination of one hundred dollars each, denominated series E and numbered from one to two hundred, inclusive, aggrigating the sum of two hundred and seventy thousand dollars.

And complainant says that said Doyle, as trustee of said last-mentioned mortgage, claims a lien upon the property of part of the property covered by the mortgage securing complainant's bonds as aforesaid, but inferior and subordinate to the lien of the said mortgages so securing complainant's bonds.

Complainant further avers that the defendant railway company, under the name of The Cape Girardeau Southwestern Railway Company, on the 28th day of May, 1888, executed under its seal its certain deed, whereby it conveyed to the defendant The Mercantile Trust Company, as trustee, amongst other property, a part of that theretofore conveyed by the said mortgages or deeds of trust of September 1, 1880, and July 18, 1881, and subject to the said last-named mortgages, for the purpose of securing an indebtedness evidenced by its bonds of that date, in the aggregate of one million dollars, in the denomination of one thousand dollars each, for the purpose in part of redeeming or exchanging the bonds theretofore issued by the said defendant upon the said several divisions of its road and for the purpose of extinguishing the floating debt of the said railway company, said last-mentioned deed of trust or mortgage being denominated the consolidated mortgage and the bonds aforesaid the consolidated mortgage bonds.

That a part of said consolidated mortgage bonds has, as your orator is informed and believes, been exchanged for dividend bonds as in said mortgage described, and that by virtue of such exchange the said Mercantile Trust Company, as trustee of said consolidated mortgage, claims some interest or ownership of bonds of the same issue as those held by the complainant, claiming, as your orator has been informed and believes, to hold said bonds as security for the bonds issued under the said consolidated mortgage under an arrangement by which said prior bonds were exchanged for consolidated bonds.

Your orator avers that he is not informed as to the extent of the claim of the said Mercantile Trust Company in this respect, and the number of prior bonds claimed to be held by it under said arrangement are not definitely known nor has your orator the means of ascertaining.

Your orator further avers upon information and belief that the

defendant railway company, on May 27, 1881, made its certain other mortgage subsequent and subject to the said mortgages of September 1, 1880, and July 18, 1881, to the defendant Leo Doyle for the purpose of securing its indebtedness of two hundred thousand dollars, the particulars of which your orator is not informed and hence cannot set forth.

Your orator further avers that the defendant railway company failed and refused to pay the interest falling due upon complainant's bonds and upon all outstanding bonds of the same issue under each of said mortgages or deeds of trust on March 1, 1892, September 1, 1892, and March 1, 1893, although the payment of such interest was duly demanded, and that all of said interest so defaulted still remain due and unpaid, and that pursuant to the terms of said mortgages or deeds of trust, to which reference is hereby made, your orator is entitled to the possession of said mortgaged property and the rents, issues, and profits thereof.

Complainant further says upon information and belief that the defendant railway company is largely in default in the payment of past-due interest upon all the bonds secured or claimed to be secured by the said junior and other mortgages of said company and is indebted in large sums of money on account of said accrued and defaulted interest, and that the said defendant railway company is insolvent without recourse or credit and wholly irresponsible; and your orator would further respectfully represent and aver upon information and belief that the defendant railway company is indebted in a large amount for wages and expenses of the operation of its said railway and is unable to pay the same or to pay the interest upon its indebtedness secured as aforesaid, and that large sums for wages of employés and claims for betterments upon said railway company have been allowed to accumulate and remain unpaid, and that such claims have been assigned and are held by the officers and agents of defendant company in charge of the property, as your orator is informed and believes, for the purpose of asserting liens for improvements and betterments as paramount and superior to complainant's mortgage upon and against said property, and that large sums of taxes are due and remain unpaid upon said property, and that unless means are adopted to prevent there is danger of the property being sold under such claims for taxes and judgments which have been allowed to accumulate against the property, and the same thereby segregated and dismembered and your orator's security impaired and rendered valueless, and that the property mortgaged is, as your orator believes, wholly inadequate to secure the mortgaged indebtedness existing there against —, and that, although the said mortgages are first lien in part on certain sections of said railway and appurtenances and second mortgages on others, *that* said property is a unit and cannot, without destroying the said several divisions and subordinate liens, be separarte- and operated in parts, but must, in order to protect the security and preform the public obligations and functions of said property, be operated as a whole.

Plaintiff further avers that the defendant Leo Doyle, the trustee

mentioned in the said mortgages of September 1, 1880, and July 18, 1881, securing complainant's bonds, is also trustee of three and more mortgages executed by the defendant railway company and hereinbefore *received*, and thereby and otherwise represents interests adverse to and in conflict with each other and with those of complainant, and that in this proceeding upon the mortgage securing complainant's bonds said Doyle is necessar-y a defendant, in order that complainant and those standing with him may have relief against him in his capacity as trustee in the said junior mortgages; and hence this complainant makes the said Doyle a party defendant.

Complainant further avers upon information and belief *and* said Doyle is further *is* disqualified by holding outside and other interests and in antagonism to the interests of complainant, and is thereby disqualified to fully and impartially *request* complainant and other stockholders claiming like interests with complainant in respect to the relief herein sought.

Complainant further avers that no action or suit to enforce the mortgage securing his said bonds or any rights thereunder or for the indebtedness for interest accruing or which has heretofore accrued on said bonds, other than this suit, has been commenced or is now being prosecuted on his behalf or on behalf of any other holders of bonds secured by mortgage. Complainant stated that The Mercantile Trust Company of New York, one of the defendant-, is a non-resident of the State, and he stated that the delay which would result from giving notice to defendant of plaintiff's intention to present his application would defeat applicant and result in an irreparable injury to him.

Wherefore your orator prays that an account be taken of all bonds issued and now outstanding secured by the mortgages sued upon, and of the amount of interest accrued and due thereon, and that the revenues arising from the operation of said road be sequestered for the payment of all interest theretofore accrued or that may hereafter accrued upon his said bonds and those for whom he sues, secured by the mortgages aforesaid, and that a receiver be appointed to take possession of and operate the said railroad as a unit, receiving the revenues therefrom until the arrearage of interest on all said bonds is paid, taking care to *ob*serve and pretect said property from dismemberment and the security from impairment, in all things managing the said property and appropriating the revenue derived from the operation thereof under the directions of this honorable court, and for such other relief as to the court may seem mete and just in the premises, and that said Doyle and said The Mercantile Trust Company make answer setting forth in detail their respective interests and claims in and to each and every part of said railway and premises.

M. L. CLARDY AND
H. S. PRIEST,
Att'ys for Plaintiff.

(Signed) ALEX. G. COCHRAN, *Of Counsel.*

STATE OF MISSOURI, }
City of St. Louis. }

E. G. Merriam, plaintiff in the above cause, being sworn, upon his oath states that the facts set forth in the foregoing petition are true except as to such facts as are stated to be upon information and belief, and these he believes to be true.

E. G. MERRIAM.

Subscribed and sworn to before me this 2nd day of March, 1893. My commission expires September 2, 1896.

HENRY G. HERBEL,
[L. S.] *Notary Public.*"

And that thereupon the said circuit court of Stoddard county did, according to the prayer of said bill, take cognizance and jurisdiction of said controversy and suit and of all the property of said railway company; and the judge of the circuit court of Stoddard county, as he might lawfully do under the practice in chancery and under the statute of this State, upon the presentation of the said bill on the said third day of March, 1893, so filed by your petitioner, appoint- a receiver, to wit, Eli Klotz, and authorized, empowered, and directed him as such receiver forthwith to take charge and possession of all and singular the property of the said railway company, manage, operate, and administer to the same under the said order and the further orders of said court; and your petitioner would further respectfully show unto your honors that a receiver was appointed, duly qualified, and made every reasonable endeavor to obtain possession of the property of which he was so appointed receiver.

Your petitioner would further respectfully show unto your honors that Louis Houck was, on the third day of March, 1893, for many years prior thereto, and ever since has been the president and general manager of the said St. Louis, Cape Girardeau & Fort Smith Railway Company, and is the owner, and has been for years past, of the vast majority of the stock thereof.

And so it is, your petitioner avers, that the said Louis Houck, having been informed of the filing of the suit by your petitioner in the circuit court of Stoddard county as aforesaid, and of the appointment of a receiver by the judge of the Stoddard county circuit court of the railway and property of the said railway company on the 4th day of March, in order to defect the jurisdiction of said circuit court of Stoddard county in your petitioner's said suit and prevent it from obtaining, through its proper officers, the possession of said railway and property of said railway company, did, in the name of the said St. Louis, Cape Girardeau & Fort Smith R'y Co., institute a pretended suit in the Cape Girardeau court of common pleas, and on the same day caused himself to be appointed by the said judge thereof, and before the filing of the said bill, a receiver of said railway company's property, and by virtue of said appointment did pretend, as the chief executive officer of said railway company, to immediately turn over to himself, as receiver so appointed as aforesaid by the

Cape Girardeau court of common pleas, all the property of the said railway company, and now, as such receiver and under the authority of the said Cape Girardeau court of common pleas as aforesaid, retains and holds the same.

Your petitioner avers that the said pretended bill so filed in the said Cape Girardeau court of common pleas by the said St. Louis, Cape Girardeau & Fort Smith Railway Company, under which the said court of common pleas has, by and through its pretended receiver, Louis Houck, assumed jurisdiction and taken possession of said property, is as follows, to wit:

"In the Cape Girardeau Court of Common Pleas within and for the County of Cape Girardeau and State of Missouri.

ST. LOUIS, CAPE GIRARDEAU & FORT SMITH RAILWAY COMPANY, Plaintiffs,
vs.
LEO DOYLE, ED. HIDDEN, & MERCANTILE TRUST COMPANY OF NEW YORK, Defendants.

In the Court of Common Pleas of the County of Cape Girardeau, Missouri, May Term, 1893.

Your petitioner, the said St. Louis, Cape Girardeau & Fort Smith Railway Company, states that the St. Louis, Cape Girardeau & Fort Smith Railway Company was organized under the laws of the State of Missouri in 1880; that it was originally organized under the name and style of the Cape Girardeau railway; that afterwards its name was changed to the Cape Girardeau Southwestern Railway, and that more recently the name of the said railroad was changed to the St. Louis, Cape Girardeau & Fort Smith R'y Co., under the laws of said State of Missouri.

Your petitioner further states that the said railroad issued $100,000 of first-mortgage bonds, under the name and style of Cape Girardeau railway, on its division of road from Cape Girardeau to Delta, and that Leo Doyle is trustee in said deed of trust securing said bonds, and that said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that it issued $80,000 bonds on its line of railroad from Delta to Lakeville, a large portion of which bonds are outstanding, and that Leo Doyle is trustee of and in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further stated that it issued $200,000 of bonds on its line of railroad from Lakeville to the St. Francois river, and that Leo Doyle is trustee in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that it issued $230,000 of bonds on its division of road from the St. Francois river to the main line of the Iron Mountain railroad, and that Leo Doyle is trustee in the

deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that a large number of the said bonds and a large number of the coupons of the said bonds are still unpaid and held by various parties to your petitioner unknown, to wit, the sum of $500,000, and that the said coupons and bonds are an underlying security upon the said property. Your petitioner further states that afterwards, in 1888, $1,000,000 of consolidated bonds were issued upon said entire railroad of petitioner for the purpose of taking up the said underlying bonds and construct the said railroad from the main line of the St. Louis, Iron Mountain and Southern railroad to Hunter, a junction with the Kansas City, Fort Scott and Memphis railroad, and that many persons to your petitioner unknown are large owners of the said bonds, to wit, the amount of $1,000,000, and that the Mercantile Trust Company of New York is trustee in said bond for the benefit of the holders thereof, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that afterwards, to wit, in 1890, a second-mortgage income bond of $150,000 was placed upon the said railroad, and that the said mortgage income bonds have been issued, and that Edward Hidden is trustee in said bond for the benefit of the holders of the same, and that said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that an Arkansas extension on bond of $850,000 is authorized on its road and $225,000 of said bonds have been issued on said railroad, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that the said St. Louis, Cape Girardeau & Fort Smith Railway Company is about one hundred miles long, extending through the counties of Cape Girardeau, Bollinger, Stoddard, Wayne, and Carter, and has an equipment of cars and locomotives, the cost of which was $250,000, and that the value of the same to the company is as much. Your petitioner further states that the St. Louis, Cape Girardeau and Fort Smith Railway Company is indebted in the sum of $180,000 on floating debts to various parties paid out in its behalf, and that for a part of said sum of $180,000 the said company has issued a first lien upon the steel rails between Williamsville and Hunter, the junction of its road; and, further, that it owes on pay-rolls about $25,000 to its employés. Your petitioner further states that the said company is unable to pay its interest and has not paid the same for a number of years, and that various parties are now making claims against the said company on account of the said interest, amounting to about $250,000, all of which on said various bonds is unpaid.

Your petitioner further states that the said property is of great value, to wit, of the valuation of $1,500,000, and ample sufficient to pay all it owes if judiciously and carefully managed so as to preserve the same. Your petitioner further states that it is informed that certain parties with small claims to it unknown are endeavoring to secure control of the said property by useless and expensive litigation, and to so handle it as to be used to the detriment of its

bondholders, stockholders, and creditors interested in the same, and to the irremediable injury of all the said bondholders and other creditors.

Your petitioner further states that it has been informed that certain parties, to it unknown, now, without any immediate necessity, are about to institute suit on coupons due from your petitioner, and otherwise to harm it, all of which will be a detriment and injury to the great many of its creditors.

Your petitioner further states that these suits instituted for said purpose will very greatly damage the owners of all of the said bonds and impair the value of the said property, injure the stockholders, and otherwise create expense and detriment to the same, and do great and irreparable harm to the creditors as a body.

Your petitioner further states that it is willing to pay its debts, that it has ample property to pay the same, and that if it has an opportunity to do so and the same property is handled under the order of the court, as directed by the court, that the same will ultimately pay all liabilities.

Your petitioner further states that the said effort to involve this property into litigation by parties to it unknown is made, as it verily believes, for the purpose of greatly injuring the same and destroying its value.

Wherefore your petitioner prays that your honorable court may appoint a receiver for the said railway, its equipment, and all property of whatsoever kind belonging to it, to manage the same for the benefit of all the creditors thereof represented by the trustees in said deeds of trust heretofore set out and hereto attached and made a part of this petition, and the trustees made defendants to this petition, and that all parties and individuals, their servants, agents, and attorneys, whatsoever they may be, be restrained and enjoined from in any way interfering with the management and control of the said property, and that the said railway, by its receiver appointed by your honorable court, *to* use, operate, and control the said property for the benefit of all said creditors, bondholders, and stockholders as aforesaid of said railroad company, and for such other and further relief as to your honorable court may seem mete and just.

ST. LOUIS, CAPE GIRARDEAU &
FORT SMITH R'Y,
By LOUIS HOUCK, *President.*

Subscribed and sworn to before me at Cape Girardeau, Mo., this 4th day of March, 1893.

ALEXANDER ROSS,
Judge of the Cape Girardeau Court of Common Pleas."

Your petitioner avers that in his said suit so instituted in the circuit court of Stoddard county process was duly issued, returnable to the September term, 1893, of the said court, and was duly served upon the defendant railway company on the 8th day of March, 1893, and upon the defendant Leo Doyle on or about the 9th day of March, 1893.

Your petitioner further avers that the Stoddard county circuit court convened in regular term on March 6th, 1893, and that the regular judge of said court, to wit, the Honorable John G. Wear, being prevented by sickness from attending at the opening of said court, the clerk thereof held an election pursuant to the provisions of the statute for the purpose of choosing some member of the bar of said court as judge thereof to preside until the regular judge should be able to return and hold such term of said court, and your petitioner avers that pursuant to said election George Houck was chosen as such temporary judge, and that said George Houck was the brother of the respondent, Louis Houck, the president and chief holder of the defendant railway company.

Your relator avers that prior to the time when said George Houck was so chosen as special judge of the circuit court of Stoddard county during the March term, 1893, he had, at the instance and for the benefit and out of consideration of his affection for his said brother, Louis Houck, knowing him to be largely interested in the said proceedings, examined into your petitioner's bill and had conferred with said Louis Houck in regard thereto, and that after he had been chosen as judge, pursuant to the request of said Louis Houck, had held a conference with him at the town of Delta on the 12th day of March, 1893, in regard to said case of your relator, and that said George Houck, although being fully advised of the facts that the said Judge Wear would on Monday morning, March 13th, be in attendance at and assume his functions as judge of said court, did, by contrivance with the said Louis Houck, notify and direct the attorneys representing Leo Doyle and the St. Louis, Cape Girardeau & Fort Smith R'y Co. to file motions before him as such judge at an early hour on Monday morning, March 13th, and did, without notice to petitioner's counsel, immediately take up and dispose of said motions, whereby he discharged Eli Klotz as receiver under the previous appointment made by the Honorable John G. Wear, judge of said court, in vacation, and that said George Houck, immediately after having entertained said motions and affirmed them, adjourned the said court in order to defeat any subsequent action by your petitioner in his suit looking towards a setting aside of the orders which he had just made, but that, notwithstanding his actions on said motions so filed by the attorneys for Leo Doyle and the said railway company, the Honorable John G. Wear shortly thereafter, conceiving the purposes of said motions, did reconvene said court and confirm the appointment of said Klotz, and questioning whether because the said court had been adjourned to court in course by said George Houck he had the right to reconvene the same, did, in addition to confirming the appointment of said Klotz, as a court make and sign an order as judge reappointing and confirming him, the said Klotz, on the same day, to wit, on the 13th day of March, 1893.

And your petitioner further avers that some questions having been raised as to the appointment of said Klotz, and also to the effect of the orders of the special judge, George Houck, and the subsequent orders of the regular circuit judge, the Honorable John G.

Wear, that the said Honorable John G. Wear did, on the 24th day of July, 1893, reappoint and confirm the said Eli Klotz as receiver aforesaid, and the said Eli Klotz did, on the same day, to wit, of the 24th day of July, 1893, duly qualify as such receiver; so that your petitioner says the Stoddard county circuit court has used every endeavor within its power to take charge of and manage and control, by and through its officers and agents, the railway and property of the said railway company, as prayed in your petitioner's said bill so filed as aforesaid in the Stoddard county circuit court, but that hitherto and now the relators herein have prevented and still prevent, under and by virtue of the pretended authority of the said Cape Girardeau court of common pleas, pursuant to the proceeding therein had, as hereinbefore stated, the said Stoddard county circuit court and its officers from obtaining and acquiring possession of said property.

And your petitioner avers that the defendant, Leo Doyle, has in contravention of his duties as trustee for relator in the mortgages aforesaid, and because of the influences as charged by relator in said bill added and abetted said St. Louis, Cape Girardeau and Fort Smith R'y Co. and the said Louis Houck in their endeavors to defeat the jurisdiction of the circuit court of Stoddard county; and that to aid in said purpose the said Leo Doyle did, voluntarily and without process, enter his appearance as trustee in the suit of the St. Louis, Cape Girardeau and Fort Smith R'y Co. against Mercantile Trust Company, Edward Hidden and himself at the request and direction of the said Louis Houck, and is now being represented in said suit by counsel employed at the suggestion and instance and by the said Louis Houck.

And so it is, may it please your honors, that the said Cape Girardeau court of common pleas, having acquired the possession by the means and in the manner aforesaid, is now threatening and about to issue a large number of receiver's certificates of the amount of two hundred and fifty thousand dollars, and make the same a lien upon all of the property of the said St. Louis, Cape Girardeau & Fort Smith R'y Co. prior and superior in right to the mortgage of your petitioner upon claims which are neither an equitable nor a legal charge upon the said property, but are claims held for the use and benefit of the said Louis Houck and parties associated with him, and that said proceedings in the said Cape Girardeau court of common pleas is still pending, and that the same greatly embarrasses and estops the proceedings of the said circuit court of Stoddard county in the cause of your petitioner, and thereby obstructs the administration of justice and the due and orderly proceeding of a jurisdiction regularly acquired prior and anterior to that of the Cape Girardeau court of common pleas.

And your petitioner further avers that a court of equity has no jurisdiction to entertain proceedings of the nature or character and purposes set forth in the bill of the said railway company in the said Cape Girardeau court of common pleas, and that all of the proceedings of the said Cape Girardeau court of common pleas are without jurisdiction and authority, and are a direct encroachment

Your petitioner further avers that the Stoddard county circuit court convened in regular term on March 6th, 1893, and that the regular judge of said court, to wit, the Honorable John G. Wear, being prevented by sickness from attending at the opening of said court, the clerk thereof held an election pursuant to the provisions of the statute for the purpose of choosing some member of the bar of said court as judge thereof to preside until the regular judge should be able to return and hold such term of said court, and your petitioner avers that pursuant to said election George Houck was chosen as such temporary judge, and that said George Houck was the brother of the respondent, Louis Houck, the president and chief holder of the defendant railway company.

Your relator avers that prior to the time when said George Houck was so chosen as special judge of the circuit court of Stoddard county during the March term, 1893, he had, at the instance and for the benefit and out of consideration of his affection for his said brother, Louis Houck, knowing him to be largely interested in the said proceedings, examined into your petitioner's bill and had conferred with said Louis Houck in regard thereto, and that after he had been chosen as judge, pursuant to the request of said Louis Houck, had held a conference with him at the town of Delta on the 12th day of March, 1893, in regard to said case of your relator, and that said George Houck, although being fully advised of the facts that the said Judge Wear would, on Monday morning, March 13th, be in attendance at and assume his functions as judge of said court, did, by contrivance with the said Louis Houck, notify and direct the attorneys representing Leo Doyle and the St. Louis, Cape Girardeau & Fort Smith R'y Co. to file motions before him as such judge at an early hour on Monday morning, March 13th, and did, without notice to petitioner's counsel, immediately take up and dispose of said motions, whereby he discharged Eli Klotz as receiver under the previous appointment made by the Honorable John G. Wear, judge of said court, in vacation, and that said George Houck, immediately after having entertained said motions and affirmed them, adjourned the said court in order to defeat any subsequent action by your petitioner in his suit looking towards a setting aside of the orders which he had just made, but that, notwithstanding his actions on said motions so filed by the attorneys for Leo Doyle and the said railway company, the Honorable John G. Wear shortly thereafter, conceiving the purposes of said motions, did reconvene said court and confirm the appointment of said Klotz, and questioning whether because the said court had been adjourned to court in course by said George Houck he had the right to reconvene the same, did, in addition to confirming the appointment of said Klotz, as a court make and sign an order as judge reappointing and confirming him, the said Klotz, on the same day, to wit, on the 13th day of March, 1893.

And your petitioner further avers that some questions having been raised as to the appointment of said Klotz, and also to the effect of the orders of the special judge, George Houck, and the subsequent orders of the regular circuit judge, the Honorable John G.

Wear, that the said Honorable John G. Wear did, on the 24th day of July, 1893, reappoint and confirm the said Eli Klotz as receiver aforesaid, and the said Eli Klotz did, on the same day, to wit, of the 24th day of July, 1893, duly qualify as such receiver; so that your petitioner says the Stoddard county circuit court has used every endeavor within its power to take charge of and manage and control, by and through its officers and agents, the railway and property of the said railway company, as prayed in your petitioner's said bill so filed as aforesaid in the Stoddard county circuit court, but that hitherto and now the relators herein have prevented and still prevent, under and by virtue of the pretended authority of the said Cape Girardeau court of common pleas, pursuant to the proceeding therein had, as hereinbefore stated, the said Stoddard county circuit court and its officers from obtaining and acquiring possession of said property.

And your petitioner avers that the defendant, Leo Doyle, has in contravention of his duties as trustee for relator in the mortgages aforesaid, and because of the influences as charged by relator in said bill added and abetted said St. Louis, Cape Girardeau and Fort Smith R'y Co. and the said Louis Houck in their endeavors to defeat the jurisdiction of the circuit court of Stoddard county; and that to aid in said purpose the said Leo Doyle did, voluntarily and without process, enter his appearance as trustee in the suit of the St. Louis, Cape Girardeau and Fort Smith R'y Co. against Mercantile Trust Company, Edward Hidden and himself at the request and direction of the said Louis Houck, and is now being represented in said suit by counsel employed at the suggestion and instance and by the said Louis Houck.

And so it is, may it please your honors, that the said Cape Girardeau court of common pleas, having acquired the possession by the means and in the manner aforesaid, is now threatening and about to issue a large number of receiver's certificates of the amount of two hundred and fifty thousand dollars, and make the same a lien upon all of the property of the said St. Louis, Cape Girardeau & Fort Smith R'y Co. prior and superior in right to the mortgage of your petitioner upon claims which are neither an equitable nor a legal charge upon the said property, but are claims held for the use and benefit of the said Louis Houck and parties associated with him, and that said proceedings in the said Cape Girardeau court of common pleas is still pending, and that the same greatly embarrasses and estops the proceedings of the said circuit court of Stoddard county in the cause of your petitioner, and thereby obstructs the administration of justice and the due and orderly proceeding of a jurisdiction regularly acquired prior and anterior to that of the Cape Girardeau court of common pleas.

And your petitioner further avers that a court of equity has no jurisdiction to entertain proceedings of the nature or character and purposes set forth in the bill of the said railway company in the said Cape Girardeau court of common pleas, and that all of the proceedings of the said Cape Girardeau court of common pleas are without jurisdiction and authority, and are a direct encroachment

upon the authority and jurisdiction of this court, and are in contempt to this honorable court, its authority and dignity, and under the constitution and the laws it is made the care and custody of this court; that the said Cape Girardeau court of common pleas, as well as all other inferior courts, keep within the bounds and limits of their several jurisdictions prescribed to them by the laws of this State.

Your petitioner herewith exhibits to this court an exemplification under the seal of the said Cape Girardeau court of common pleas and under the hand of the clerk thereof of the record and proceedings had in the said court of common pleas in the said cause in the matter stated in his petition.

And said petitioner further again states that the proceedings instituted and followed as aforesaid in the said Cape Girardeau court of common pleas are in excess of the jurisdiction and authority of the said court and for the express purpose of defeating and thwarting the jurisdiction of the Stoddard county circuit court in the proceedings so instituted as aforesaid by your petitioner.

Wherefore your petitioner, imploring the aid of this honorable court, prays to be relieved, and that he may have the State's writ of prohibition directed to the said Alexander Ross, judge of the said Cape Girardeau court of common pleas, and to the other relators, to prohibit him and them from pursuing and holding the pleas aforesaid and from taking any further cognizance of the said suit before them touching or concerning the premises, and that should your honors deem the said writ of prohibition inapplicable to the facts and circumstances set forth herein that your honors, under the duties imposed upon this court by the constitution of exercising a supervisory and superintending control over all inferior courts, will devise such writs and make such orders as will prevent an unseemly physical conflict between said circuit court of Stoddard county and the said Cape Girardeau court of common pleas, directing said court of common pleas to surrender to the proper jurisdiction of the circuit court of Stoddard county the said property of the said railway company.

H. S. PRIEST,
Att'y for Petitioner.

ALEX. G. COCHRAN AND
MARTIN L. CLARDY, *Of Counsel.*

STATE OF MISSOURI, }
City of St. Louis. }

Edwin G. Merriam, being duly sworn, upon his oath says that he has read the foregoing petition, and that the facts therein stated to be true are true, and those stated to be upon information and belief he believes to be true.

EDWIN G. MERRIAM.

Subscribed and sworn to before me this 25 day of July, 1893.

HENRY G. HERBEL,
Notary Public.

My commission expires Sept. 2nd, 1896.
[SEAL.]

(MEMORANDUM.—In the original record as filed there is here inserted the record of the case pending in the court of common pleas in Cape Girardeau county, consisting of the provisional order appointing Houck receiver; the receiver's bond; injunctions against Klotz, receiver, Merriam, Priest, and others; the motion of Klotz, receiver, to cancel orders appointing Houck receiver, and continuance of hearing of the same to the next term; order of clerk for summons; answer of Doyle, trustee; order appointing Houck receiver; petition; order appointing Houck receiver; receiver's bond; injunctions against Klotz, receiver, Merriam, Priest, and others; order of Stoddard county circuit court appointing Klotz receiver, March 3rd, 1893; motion Klotz, receiver, to cancel order and continuance of hearing to next term; order of publication for Mercantile Trust Company; amended bill; answer of Doyle, trustee; order confirming Houck's appointment; deposition of Mr. Merriam, and also numerous orders relating to the administration of the trust, receiver's reports, inventories, etc.)

(Record, page 248.)

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas, *et al.*

Answer of Respondent.

May it please your honors: Your respondent, as judge of the Cape Girardeau court of common pleas, for and in his own behalf, makes answer to the suggestions of relator, and, answering, says that Louis Houck on the 4th of March, 1893, did not cause himself to be appointed as receiver by the judge of said court and before the filing of the said bill.

And avers the facts to be that when said petition was presented it was carefully considered by the judge, your respondent, and after much care and deliberation the merits of the following-named gentlemen in relation to the receivership were canvassed and considered by respondent, no person being present to consult, advise, or recommend, viz., Rob't Sturdivant, president of the Sturdivant bank; Leon J. Albert, cashier of the same; Edward F. Blomeyer, former general superintendent of the railway; also Edward S. Lilly, merchant, each and all of whom were for cause disqualified for the responsible office of receiver, and after due deliberation, the several interests of the employees, creditors, stock and bond holders carefully considered, Louis Houck was the only practical, experienced, and responsible person known to respondent who could give the bond required and perform the duties of receiver under the order of the court, and for said reasons said Louis Houck was appointed and placed in charge of the property.

Respondent further states that said appointment was made in regular order, the papers placed in the hands of the clerk of the court by your respondent and in his presence filed, which application, appointment, and filing constituted one and the same transaction, all being done by the judge without consultation, suggestion, or advice from any person whatsoever.

Respondent admits that now, "as such receiver and under the authority of said court as aforesaid, Louis Houck retains and holds" the said railroad under the orders of this court, as he is in duty bound to do.

Respondent denies the allegation of relator that the Cape Girardeau court of common pleas is a court of doubtful or "pretended authority," and alleges the facts to be that said court is a court of coordinate jurisdiction with the circuit courts in all civil actions at law or equity, and as such has power to appoint and control receivers, a power exercised by said court under its general equity jurisdiction conferred on it by law; that respondent, as such judge, has now four cases pending in said court wherein receivers have been appointed, all of which cases (the railroad case excepted, which is now stayed by rule) are running the usual course of such litigation.

Your respondent denies the allegation of relator "that the said Cape Girardeau court of common pleas, having acquired possession by means and in the manner aforesaid, is now about to issue a large number of receiver's certificates of the amount of two hundred and fifty thousand dollars, and denies that the said court or the judge thereof ever "threatened" or, by word, act, or intimated, express or implied, gave relator or any other person any cause to think or believe that the court would issue receiver's certificates in any quantity whatever.

Respondent admits that the unpaid employees of said railroad company, also creditors and material men, have petitions pending before said court praying for the issuance of receiver's certificates, but said claims have not as yet been considered or adjudicated nor their merits investigated; that all of said claims are now being contested in the said court by attorneys fully capable to represent the interests of the several bondholders of said company.

Respondent denies the statement of relator "that all the proceedings of the said common pleas court are without jurisdiction and authority" and avers the facts to be that said court, in all matters and things relating to or in any way bearing on said cause of action and all side issues springing therefrom, is acting strictly within the laws of this State and equity jurisprudence as defined and upheld by this honorable court.

And further avers and states the facts to be that twenty miles of the twenty-five covered by the mortgage under which relator claims, being the most valuable and remunerative division of the line, together with the headquarters of the said railroad, with all its officers, the principal offices, depots containing the books, papers, and monies; the machine and repair shops, storage tracks for cars and locomotives, all are situated in the county of Cape Girardeau and within the jurisdiction of said court, and, further, that all the de-

fendants have entered appearance in said court and ple-d to the said cause of action now pending therein.

Respondent denies the statement of relator "that the proceedings instituted and followed as aforesaid in the said court of common pleas are in excess of the jurisdiction and authority of the said court and for the express purpose of defeating and thwarting the jurisdiction of Stoddard county circuit court," and avers the facts to be that said court of common pleas is acting within its lawful jurisdiction, a jurisdiction it has exercised in equity proceedings during the forty years of its existence, and, further, that at the time of the appointment of the receiver by said court respondent, as judge thereof, had no knowledge or information relating to any action whatever having been instituted by the relator in said Stoddard court.

And respondent avers further and states the facts to be that the action of the relator in procuring the rule against respondent, as judge of the court of common pleas, has embarrassed the court in its lawful action in protecting, husbanding, and improving the railway and thereby enhancing the values and interests of the bondholders, unpaid laborers, creditors, and stockholders of said railway company by obstructing and delaying necessary repairs and improvements of the road-bed and superstructures, thereby endangering the lives of employees and passengers and forcing said court and receiver to disregard and disobey the orders of the State railroad & warehouse commissioners; that this litigation depresses the income and value of the property now in the custody and care of said court and its receiver, as respondent has been creditably informed.

Now, may it please your honorable court, respondent, having fully answered, prays your honors to discharge the rule, &c.

ALEXANDER ROSS.

Which said return of the St. Louis, Cape Girardeau & Fort Smith Railway Company is in words and figures as follows, to wit:

(Record, page 253.)

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM *vs.* ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas; The St. Louis, Cape Girardeau & Fort Smith R'y Co.; Louis Houck, President of said Railway Company, as Well as Pretended Receiver of All of the Assets Thereof under Appointment of the said Judge of the said Court of Common Pleas; Leo Doyle; The Mercantile Trust Company, a Corporation, and Edward Hidden, Respondents.	Return of the Railway Company.

Comes now The St. Louis, Cape Girardeau & Fort Smith Railway Company, one of the respondents in the above-entitled cause, saving to itself all advantages and exceptions as well to the rule issued herein (and heretofore served upon it) as to the petition upon which said rule was, on or about the 9th day of July, 1893, issued, and, for its separate return hereto, admits that it is a corporation duly organized under the laws of the State of Missouri, and that it owned and operated prior to the 4th of March, 1893, that certain line of railway extending from Cape Girardeau city, in the county of Cape Girardeau, in a southwesterly direction through the counties of Stoddard and Wayne into the county of Carter to Hunter, the terminus of said railway, in the county last mentioned, in length about one hundred miles, all in the State of Missouri.

Respondent admits that it was originally organized under the name of the Cape Girardeau Railway Company; that its name was afterwards changed to that of the Cape Girardeau Southwestern Railway Company, and again changed to its present name, the St. Louis, Cape Girardeau & Fort Smith Railway Company.

Respondent further admits that said railway company did, on September 1st, 1880, make to Leo Doyle, as trustee therein, a certain mortgage of that date and secured an issue of its bonds, in number one hundred, of the denomination of one thousand dollars each, upon that part of its road between the city of Cape Girardeau and Delta, the junction, a distance of fifteen miles, and, further, that on July 18th, 1881, said company made to Leo Doyle, as trustee, its mortgage to secure the issue of one hundred and seventy of its bonds, one hundred of which are of the denomination of one hundred dollars each and seventy of the denomination of one thousand dollars each, on that part of its line between Delta, in the county of Cape Girardeau, and Lakeville, in the county of Stoddard, a distance of eleven miles.

Respondent avers that said bonds issued and secured as aforesaid bore interest at the rate of six per cent. per annum, payable semi-annually at the National Bank of Commerce, in the city of New

York, and, further, that the bonds issued under the first of said mortgages do not mature until the 1st day of September, A. D. 1900, and that the bonds issued under the second of said mortgages bore a like rate of interest and do not mature until the 1st day of September, A. D. 1902.

Respondent further avers that it executed its mortgage dated May 27th, 1882, as alleged in petitioner's petition herein, to secure two hundred bonds of one thousand dollars each, with interest at six per cent., maturing in 1902; that in said mortgage it conveyed that part of its railroad lying between mile-post 25, in Stoddard county, *the* the St. Francois river, in Wayne county, a distance of about twenty-two miles.

Respondent further avers that it made to Leo Doyle, as trustee, a certain other mortgage, dated December 1st, 1885, to secure bonds issued thereunder amounting to two hundred and seventy thousand dollars, bearing interest at six per cent. and maturing in 1906.

That it conveyed in said mortgage its line of road from the city of Cape Girardeau to Wappapello, in Wayne county, a distance of fifty miles, subject to the two mortgages herein first described.

Respondent admits that on the 26th of May, 1888, it made to the Mercantile Trust Company, as trustee, its certa*i*l mortgage to secure an issue of one thousand bonds of the denomination of one thousand dollars each upon its entire line of road for the purpose of exchanging said bonds for bonds issued and secured by mortgages of date September 1st, 1880, and of July 18th, 1881, and for the further purpose of aiding in the construction and extension of said railway to the town of Hunter; and respondent avers that said mortgage and bonds were denominated the consolidated mortgage and bonds.

Respondent avers that it executed a certain income-bond mortgage of date — day of August, 1890, to secure one hundred and fifty thousand dollars income bonds, and that Edward Hidden was made trustee therein; that said mortgage covered all of respondent's line of railway subject to the foregoing-described mortgages.

Respondent denies that said petitioner is the real holder or owner of the bonds as alleged in his petition, but avers that the real owners and holders of said bonds are the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, but as to the number that each of said compan*y* hold and own respondent is not informed.

Respondent further avers that said petitioner, Merriam, at the time that he claims to have purchased the aforesaid bonds, was without means sufficient to buy the same, and that said bonds were transferred by George J. Gould, the agent of the said Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, to petitioner, who was then and now is a salaried employee of said companies, without consideration and for the sole purpose of instituting suits to harass and vex this respondent and to wreck its line of railroad with the view of obtaining it without paying its value therefor.

Respondent further avers that it is not informed and has no means of knowing definitely how many of the bonds issued under

the mortgages of September 1st, 1880, and of July 18th, 1881, have been exchanged for the consolidated mortgage bonds secured by the mortgage in which the Mercantile Trust Company is trustee, but the respondent does know and so states that a large part of said bonds, to wit, not less than one-fourth in number and amount thereof, have been issued and exchanged under the terms of said consolidated mortgage or deed of trust.

Respondent admits that default in the payment of the interest coupons attached to said bonds was made as alleged in petitioner's petition in this behalf; admits that said Merriam did, in the 3rd day of March last, file in the office of the clerk of the circuit court of Stoddard county the so-called bill set out in full by him; denies that said petition was filed for the pretended purpose of collecting the back interest on said bonds, nor was it filed in the interest of others alleged to have been in a similar situation, but avers, on the contrary, that no others were situated as is said Merriam, and that said bill was filed for the purpose of harassing, injuring, and wrecking this respondent's property and with a view of seizing it by the process of the court and holding it and using it in the interest of said Merriam and of his abettors without compensation; and avers that said so-called bill filed in the said circuit court of Stoddard county is without equity, against public policy, and unjust and does not state a cause of action nor present a cause of any nature over which said circuit court did, does, or can have jurisdiction.

This respondent denies that the circuit court of Stoddard county did take cognizance or jurisdiction of said controversy or suit or of all or any of the property of this respondent. It admits and avers, however, that the judge of said court, upon presentation to him of the aforesaid petition of said Merriam, at a place outside of Stoddard county, to wit, at Poplar Bluff, in Butler county, and in the absence of all the defendants named in the petition and without notice to any of them, and before the filing of said petition in court or with the clerk, and before the institution of any suit, and when no suit was pending, did, on the 3rd day of March, 1893, assume to appoint one Eli Klotz as receiver, and did pretend to authorize, empower, and direct him as such receiver forthwith to take charge and possession of all and singular the property of said railway company, manage, operate, and administer the same under said pretended order and the further orders of said court; and this respondent further avers that several hours after making said pretended appointment the aforesaid petitions were simultaneously delivered to the clerk of said Stoddard county circuit court, both of them being in one and the same envelope, and were simultaneously filed by said clerk. This respondent denies that the action of said judge in making said appointment was such as he, said judge, might lawfully do under the practice in chancery or under the statutes of this State, and denies that said pretended appointment of receiver was made, as averred by relator, upon any bill which had then been filed as pretended and indirectly averred by relator.

Respondent denies that a receiver was appointed by said court

or judge of Stoddard circuit court. He avers that said Klotz, claiming to be such receiver, pretended to qualify as such on the 7th day of March, 1893, and no earlier. He denies that said Klotz as such receiver made every or any reasonable endeavor to obtain possession of the property of which he pretended to have been appointed receiver.

Respondent admits that said Louis Houck had been the president and general manager of its said railroad from its organization up to the 3rd day of March last, and avers that he was such officer up to the 4th day of March last, on which said day he was appointed receiver of it and of all its property and effects, and admits that he was and is yet the owner of the majority of its stock.

Admits further that its president, Louis Houck, was informed on or about the 4th day of March last that a suit had been or was about to be filed in the office of the clerk of the circuit court of Stoddard county, but for what exact purpose or by whom respondent was not then nor at any time before said suit was commenced by respondent informed in any way whatever, and admits further that it, by its president, Louis Houck, on the 4th day of March did file in the office of the clerk of the court of common pleas its petition, wherein it alleged and set out all of its indebtedness of every kind, mortgaged and otherwise, and praying for the appointment of a receiver to take charge of all its said property, and in said petition, which was afterwards amended, it asked for the foreclosure of any or all of such mortgages as by the court might be considered proper, and for a full and complete administration of all its property for the use and benefit of its creditors, preserving to each it or his liens or equities as the facts might show.

Respondent denies that said petition was filed for the purpose of defeating the jurisdiction of the said circuit court of Stoddard county and to prevent it from obtaining through its proper officers the possession of said railway and its property and effects thereto belonging, but avers that said petition was filed for the purposes as aforesaid stated, and for the further purpose of preventing the road from passing into the hands of wreckers and becoming lost to those who had furnished the labor and means by which it had been constructed and operated.

Respondent avers that upon the filing of said petition Louis Houck, one of the respondents herein, was on the 4th day of March, 1893, by the honorable judge of the said Cape Girardeau court of common pleas, appointed receiver of said railway and of all its property; that he immediately and on said last-named day took possession of it as receiver, having duly qualified and given bond as such, and as such receiver he has been ever since and is yet managing and operating said road. It also avers that said petition filed in said court of common pleas was, at the May term of such common pleas court and by leave of court, amended by the filing of a new petition as aforesaid, a copy of which is hereto annexed as Exhibit "A," and prays to be made a part hereof as fully as if set out in the very words thereof, and that the appointment of the said Louis Houck as receiver theretofore was duly confirmed in

all things by an order of court entered of record, a copy of which said order is hereto annexed as Exhibit "B."

It further avers that said Houck took the oath as receiver, and duly executed a bond as such in the sum of fifty thousand dollars, with approved security, immediately upon his appointment, and that he is now and has been ever since said 4th day of March in possession of, operating and managing said railway and all its property under the order and directions of said Cape Girardeau court of common pleas and as the officer of said court.

Admits that the process of summons was, by the circuit clerk of Stoddard county, issued on the petition of said Merriam on the 7th of March last, but avers that it was not before issued, and that said summons was made returnable to the September term, 1893, of said court, and admits that said summons was on or about the 8th day of March last and not before served upon the defendant railway company in said petition, and was on the 9th day of said month and not before served upon Leo Doyle, one of the respondents herein.

Respondent avers that on or about the 5th day of September last, in open court, it filed its answer to the petition of said Merriam in the circuit court of Stoddard county, a copy of which is hereto attached and marked Exhibit "C," and is prayed to be made a part of this return; and respondent avers that in said answer it, the defendant herein, made a full and complete tender of all the due and accrued interest on said bonds up to date claimed by petitioner, Merriam, with costs.

Respondent now and here again offers to pay all of said accrued interest up to date and all costs incurred that would be lawful for it to pay, and avers, as it averred in receiver's return hereto, that the necessary amount to pay all of said back interest and costs will be deposited either in cash or by certified check in any bank that may be designated by this honorable court within the time fixed by the court, or will pay to or make such said deposit with the clerk of this honorable court, if so directed.

Respondent avers that said offer to pay said due and unpaid interest and the tender of the full amount hereof is made to protect its property for the interest of all its creditors, and for no other purpose; and it further avers that said payment of interest herein, as well as in respondent Houck's return, is tendered under the directions and by the authority and order of the honorable judge of the Cape Girardeau court of common pleas.

Respondent further avers that all the defendants in the cause instituted by it in the said Cape Girardeau court of common pleas, and wherein Louis Houck was appointed receiver, have appeared and filed pleas thereto; and avers that petitioner Merriam, notwithstanding his alleged interest in certain bonds involved as an issue in said cause, and having full notice of the pendency of said cause, has failed and refused to intervene or otherwise appear to said proceeding and file answer or other plea to the petition therein; and avers that neither he nor any one in his interest has by motion, plea, or otherwise interposed any plea to the jurisdiction of said

common pleas court in said cause, and that the only papers filed therein by the said Merriam or any one representing him was filed on or about March 9th, 1892, by the attorneys of the aforementioned Eli Klotz, then claiming to be receiver of the property of this respondent, by the appointment of the circuit court of Stoddard county, wherein was suggested the appointment of said Klotz receiver aforesaid, and praying for an order of delivery to him, the said Klotz, of the property then in possession of Louis Houck as receiver.

Respondent avers that said motion was filed on the 9th of March last, five days after the appointment of respondent Houck as receiver, and that the same has never been called up or any argument made thereon, and that it has been from time to time continued and is yet pending in said court; and respondent avers that said Merriam has at all times since the execution of the deeds of trust under which he claims as set out in his so-called bill, and is now, both in said suit in said common pleas court and elsewhere as to the said bonds and coupons claimed by said Merriam, legally and fully represented by said Leo Doyle as trustee, who has at all times stood and now is ready to represent said bonds and coupons and each of them in any and all proceedings, and to faithfully execute the trust assumed by him.

And this respondent, for further return in this behalf, states that since the said action in the said common pleas court was commenced said Leo Doyle, one of the defendants therein, and who is the trustee in said divisional mortgages or deeds of trust under which said Merriam, relator herein, claims to hold said bonds and coupons described by him, has appeared in said action in said common pleas court and has as said trustee answered said petition of this respondent and has by his cross-petition set up in due form and according to their true and legal effect all of the provisions and of said divisional mortgages, wherein he, said Doyle, is trustee, and otherwise legally pleaded for relief by the prosecution of said order of receivership under which said Houck is appointed and acting, and by such other orders, decrees of foreclosure and sale, judgment, and proceedings and the exercise of its general jurisdiction as to equity and justice appertain and to said court of common pleas seems meet, and that said last-named court has entertained said answer and cross-bill, and was, when the present application for a writ of prohibition was filed, proceeding in all matters relating to said receivership, as well as all other matters in said action under said cross-petition and answer, as well as under said original and said amended petition filed therein by this respondent.

Respondent further avers that the jurisdiction of said common pleas court is a question authorized by the statutes of this State to be raised by answer or by the intervention in the proper manner by petitioner Merriam, and until the same is done as directed by the statute aforesaid a writ of prohibition cannot be invoked to determine such question.

Respondent further avers and states that the action of said Special Judge George Houck, taken and had on the 13th of March

last, relating to the order made by the Honorable John G. Wear, judge of the circuit court of Stoddard county, in vacation, attempted to appoint the said Eli Klotz receiver of said railway and its property, in setting aside and vacating the order of such appointment of the said Klotz, was by this honorable court, in its decision heretofore rendered in the case of The State *ex rel. vs.* Alexander Ross *et al.*, sustained; and the appointment of the said Klotz as receiver by the said Honorable John G. Wear was held to have been by said Special Judge George Houck, on the 13th day of March last as aforesaid, duly set aside and vacated; and respondent avers that this honorable court in its said decision held that the action of said John G. Wear, judge as aforesaid, had on the 13th day of March last, in the court-house of Stoddard county, after the circuit court for that term had been duly adjourned by Special Judge George Houck, relating to the confirmation of the said Klotz's provisional appointment as receiver of said railroad company and its property, was void and of no effect.

Respondent denies that the said Honorable John G. Wear did, on the 24th day of July, 1893, reappoint and confirm the said Eli Klotz as receiver of said railway company, and denies that he, the said Klotz, did on the same day or that he ever did qualify as such receiver; and respondent further states that if any pretended appointment was then made respondent had no notice of it or of any intended appointment for it, and the same is illegal and void.

Respondent denies that the said Stoddard county circuit court has used any endeavor to take charge of, manage, and control by and through its officers and agents said railway and its property. On the contrary, it avers that said court refused to confirm said Klotz as receiver, but did on March 13th, 1893, vacate said order of appointment, as by said record, here offered, appears. It admits that the respondent, Louis Houck, as receiver herein, has had possession of all said property under the order and by the appointment of the honorable judge of the Cape Girardeau court of common pleas, and avers that said court was duly authorized and had full power to appoint its corespondent, Louis Houck, as receiver as aforesaid, and avers that the appointment alleged to have been made by the Honorable John G. Wear, on the 24th day of July last, of the said Eli Klotz, if made as alleged, was made without authority and after *the* a court of competent and co-ordinate jurisdiction with the said circuit court of Stoddard county had acquired jurisdiction over both the company and its property, its receiver having taken and had actual possession of the latter long before said alleged appointment was made and before the summons was issued in said action in said circuit court of Stoddard county or served on any one named therein at any time, and that at the time when said appointment is alleged to have been made motions to change the venue of said cause on account of the disqualifications of said Wear, as judge, were then pending and undisposed of in said court, the same having been duly filed in said court in said cause on the 13th day of March, 1893, same being filed and made by this respondent and Leo Doyle, copy of which are herewith filed as Exhibit "D."

Respondent denies specifically that the Cape Girardeau court of common pleas is now threatening to make an order authorizing the receiver, Louis Houck, to issue a large number of receiver's certificates to the amount of two hundred and fifty thousand dollars, and the same make a lien on all the property of this respondent prior to and superior in right to the mortgages of your petitioner upon claims which are neither an equitable or legal charge upon said property, and denies that said claims for which receivers' certificates are alleged to be about to be issued are held for the use and benefit of the said Louis Houck and parties associated with him; but respondent avers that notice had been given to all parties defendant in said suit pending in the common pleas court and to all other parties interested that it would apply at a certain time to the judge of said common pleas court for an order authorizing its said receiver to issue certificates in the sum not to exceed two hundred and fifty thousand dollars or in such sum as the court might direct.

Respondent avers that said petitioner was duly notified that such said action for receiver's certificates was about to be taken.

Respondent avers that large sums of money—that is to say, thirty thousand dollars or more—are due on the back pay-rolls within six months prior to said railway and its property going into the hands of Louis Houck as receiver, and avers that certain other large sums of money—that is to say, one hundred and fifty thousand dollars or more—was due and unpaid various parties for work done and material furnished in rebuilding and repairing bridges, culverts, and road-beds and supplying timbers and ties washed away and lost to said company by reason of the great floods of the spring of 1892 and prior thereto, and avers that there *was* other sums due of smaller amounts and owing by said railway company for expenditures that had been made necessary in order to keep said railway in safe running condition.

Respondent avers that said expenditures as aforesaid had to be made and were made at the time and for the purpose aforesaid; that to have failed and refused to make such repairs would have resulted in ceasing to operate said road, and that it could not have been operated had not such expenditures *have* been made, and its duty to the public required — it as a common carrier by virtue of its charter could not have been performed, and it avers that the gr-ater amount of said claims for which receiver's certificates are and will be asked are claimed, due, and owing laboring and material men, and for the want of which many of the laboring men must and will suffer unless they can be by some method speedily paid, and it charges that one of the objects moving the relator, Merriam, to prosecute his suit in the Stoddard county circuit court is to shut out and avoid the payment of any of these claims.

Respondent denies that the said Cape Girardeau court of common pleas has ever or is now threatening to make an order for the issuance of receiver's certificates as aforesaid; denies that said court ever in any manner indicated what it would do after application had been made praying for such order, and that the charge made

by said petitioner in his petition to that effect is untrue and made for the purpose of discrediting the judge of said court in the opinion of this honorable court, and avers that all the allegations and matters set up in the petition of said petitioner relating to the collusion of Special Judge George Houck with his brother, Louis Houck, alleged to have been for the purpose of setting aside and vacating the said provisional order made by the Honorable John G. Wear appointing the said Eli Klotz, are untrue and have by this honorable court been heretofore considered, passed on, and adjudicated in its decision rendered in the case of The State of Missouri *ex rel.* Eli Klotz *vs.* Judge Alexander Ross *et al.* and wherein the parties in interest were the same as in this action, as by said record here now offered appears, and are now *res adjudicata* and are not subject to further judicial investigation herein.

Respondent denies that a court of equity had no jurisdiction to entertain proceedings of the nature and character and for the purpose set forth in said railway company's petition and amended petition filed in the office of the clerk of the said Cape Girardeau court of common pleas as aforesaid; and, on the contrary, avers that the Cape Girardeau court of common pleas, as a court of equity, had jurisdiction to entertain the matters and things alleged in said petition, and avers that said petition stated facts sufficient to constitute a good, legal, and valid cause of action, and avers that the honorable judge of said court, believing and adjudicating the question that said petition did state a cause of action, thereupon appointed respondent Louis Houk receiver as aforesaid in accordance with the prayer of said petition, and again avers that said petition was amended by the filing of a new petition at the last May term of said court and that a copy thereof is hereto attached as aforesaid.

Respondent denies that the proceedings instituted by said railway company in said Cape Girardeau court of common pleas are in excess of the jurisdiction and authority of said court, which, it avers, is a court of general jurisdiction in all civil actions, and that it has full power to do all things incident and necessary to the exercise of such general jurisdiction touching all causes coming within its cognizance, and denies that said proceedings were instituted for the express purpose of defeating and thwarting the jurisdiction of the Stoddard county circuit court or for any other purpose than that as stated in said petition filed in said common pleas court and as thereafter amended as aforesaid.

Respondent avers further that said court has made no order or orders or done anything in said proceeding in relation to the receivership of said railway company, this respondent, or in any other manner in excess of its power in exercise of its functions as a court of general jurisdiction at law and in equity.

Respondent avers further that the suit instituted by petitioner in the circuit court of Stoddard county as aforesaid is now pending in the Iron county circuit court on change of venue, by stipulation, and will be for trial in said court at the October term, 1893, thereof; and further avers that the suit pending in said court of common pleas is also ready for trial, and avers that said petitioner has his

remedies in either of said courts, and avers that he refuses to seek them in the ordinary way as the law directs, and avers that this extraordinary remedy, by prohibition, is resorted to solely for the purpose of (harassing, vexing, and annoying this respondent and its receiver, and vexing, annoying, and) harassing the Honorable Alexander Ross, judge of the said court of common pleas, and others, these respondents.

Respondent further avers that the action and conduct of the said Leo Doyle, trustee as aforesaid in the several mortgages herein described, has been fair and impartial, and, as he considered, to the best interest of all the bondholders and creditors of said railway compay, this respondent; and respondent avers that petitioner and his counsellors and abettors refuse to comply with the terms of the mortgages securing the bonds claimed by him in this, that said petitioner refused to apply in the name of one-fourth of the bondholders under said mortgages and as provided in said mortgages to said Leo Doyle, as trustee therein, to have him take charge of said road and perform the necessary things by the terms of said mortgages, to collect said default and unpaid interest, but, on the contrary, filed his petition in said circuit court of Stoddard county praying for the taking of an accounting on the back and accrued interest due and unpaid on his alleged bonds secured by mortgages as aforesaid, and also prayed therein for the extraordinary remedy of the appointment of a receiver to take charge of respondent's entire line of railway, to run and operate the same, and to sequester the rents and profits thereof to the payment of the said due and unpaid interest on his said bonds.

Respondent avers and charges that petitioner, by the aid and counsel of the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company, *have* sought and *are*, by the most extraordinary litigation, seeking to subvert and use the courts of the State in carrying out the designs of said railway companies in seizing and appropriating the entire line of this respondent's railway and all its property for the pretended purpose of procuring the payment of not to excee- eight or nine thousand dollars in defaulted interest and to the great and irreparable injury and damage of all of the bondholders and creditors of this respondent; and, further, respondent denies every allegation in said petition not hereinbefore expressly admitted or denied.

This respondent, further answering, says that the bonds which the said Merriam pretends to have and to own, secured by the *tow* divisional mortgages aforesaid, have, by virtue of said mortgages, a lien upon the fifteen miles of the road from the city of Cape Girardeau to Delta, fifteen miles, and from Delta to Lakeville, in Stoddard county, a further distance of eleven miles, and no more; that it is expressly stipulated in each of said mortgages that nothing in them shall effect or be construed to be a lien upon the right of way and other property beyond the last-named point—that is, beyond Lakeville, in Stoddard county; that while the mortgage from Delta to Lakeville is a second mortgage over the road from Cape Girardeau to Delta the one from Cape Girardeau to Delta is not a

mortgage or lien upon the part from Delta to Lakeville, nor do either of said mortgages cover any portion of the road west of or beyond Lakeville. Reference is made to both of said mortgages as well as to the others referred to herein as fully as if they were set out herein in full, and this respondent avers that only five miles of the road covered by the first and second mortgages lie in Stoddard county or in the judicial circuit of which said county forms a part, and respondent avers that any action by said judge of the circuit court of Stoddard county or by said court itself attempting to seize out of the possession of this respondent under either of said divisional mortgages all of said railroad or any other part thereof than that expressly named in said divisional mortgages was and is and must be against the contract expressed in said last-named mortgages and against the express provisions of both the constitution of Missouri and the Constitution of the United States, providing that no person shall be deprived of property without due process of law, and is against the law of the land.

Respondent avers that said Merriam has no. interest, right, or claim of any kind whatever to the seventy-three miles and over beyond Lakeville to Hunter's, its junction with the Current River railroad, nor did nor could the circuit court of Stoddard county ever acquire any jurisdiction over that part of the road from and beyond Lakeville, in the Merriam suit, notwithstanding which it was attempted by said Merriam to have said court take possession and appropriate the revenue under his pretended bill of the whole of said road, and it is now sought to accomplish the same thing through the process of this court.

Wherefore respondent says that petitioner is not entitled to his peremptory writ of prohibition, nor to any other extraordinary process, as prayed in this behalf, and avers that this proceeding ought to be dismissed at the cost of petitioner.

ST. LOUIS, CAPE GIRARDEAU &
FORT SMITH R'Y CO.,
By M. R. SMITH,
Attorneys for the said Railroad Company.

JOHN W. NOBLE AND
GEO. D. REYNOLDS,
Of Counsel.

(MEMORANDUM.—Here is inserted Exhibit "A" of said answer, being the bill filed in the court of common pleas of Cape Girardeau County Exhibit "B," order appointing Houck receiver; Exhibit "C," answer of railway company in Stoddard County circuit court; Exhibit "D," motion for change of venue from Stoddard county.)

(Record, page 317.)

Which said return of Louis Houck, as receiver and president of said railway company, is in the words and figures following, to wit:

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas; The St. Louis, Cape Girardea & Ft. Smith R'y Co.; Louis Houck, President of said Railroad Company, as Well as Pretended Receiver of all of the Assets Thereof under Appointment of the said Judge of the said Court of Common Pleas; Leo Doyle; The Mercantile Trust Company, a Corporation, and Edward Hidden, Respondents.

Return of Louis Houck, as Receiver and as President.

Comes now Louis Houck, respondent in the above-entitled cause, as president and also as receiver of the St. Louis, Cape Girardeau & Fort Smith Railway Company, saving to himself all advantages and exceptions, as well to the rule issued herein (and heretofore served upon him) as to the petition, upon which said rule was on or about the 9th of July, 1893, issued, and for his separate return thereto admits that said St. Louis, Cape Girardeau & Fort Smith Railway Company is a corporation duly organized under the laws of the State of Missouri, and that it owned and operated prior to the 4th day of March, 1893, that certain line of railway extending from the city of Cape Girardeau, in the county of Cape Girardeau, in a southwesterly direction through the counties of Stoddard, Wayne, and into the county of Carter, to the town of Hunter, in the county last mentioned, in length about one hundred miles, all in the State of Missouri.

Respondent admits that said railway company was originally organized by the name and style of the Cape Girardeau Railway Company, and that afterwards its name was changed to that of the Cape Girardeau Southwestern Railway Company, and that its name was again changed to its present name, the St. Louis, Cape Girardeau & Ft. Smith Railway Company.

Further respondent admits that on September 1st, 1880, said railway company made to Leo Doyle, as trustee, its certain mortgage of that date to secure an issue of its bonds, in number one hundred, of the denomination of one thousand dollars each, upon that part of its road between the cities of Cape Girardeau and Delta; and that on July 18th, 1881, said company made to Doyle, as trustee, its mortgage to secure the issue of one hundred and seventy of its bonds, one hundred of which are of the denomination of one hundred dollars each, and seventy of the denomination of one thousand dollars each, on that part of its line between Delta, in the county of Cape Girardeau, and Lakeville, in the county of Stoddard, a distance of eleven miles.

That said railway company on May 27th, 1882, again made to Leo Doyle, as trustee, its mortgage to secure two hundred bonds, of the denomination of one thousand dollars each, upon that part of

its road between Lakeville and the St. Francois river; and admits that on May 26th, 1888, said railway company made to the Mercantile Trust Company, as trustee, its mortgages to secure an issue of one thousand bonds, of the denomination of one thousand dollars each, upon its entire road from Cape Girardeau to Hunter, in the county of Carter, for the purpose of exchanging said bonds for those theretofore issued and secured by the aforesaid mortgages, and for the further purpose of extending said railway from the St. Francois river to the said town of Hunter; and avers that said mortgage and bonds were denominated the consolidated mortgage and bonds.

Respondent avers that said railway company executed other mortgages on said property or line of road and issued bonds thereunder in aid of construction thereof; that in one of the said mortgages said Leo Doyle was trustee and that in the other of said mortgages Edward Hidden was trustee.

Respondent admits that the said plaintiff, E. G. Merriam, is the ostensible holder of twenty-seven thousand of the one hundred thousand dollar bonds issued under and secured by the said mortgage of September 1st, 1880, and forty-nine thousand and two hundred of the eighty thousand dollars in bonds issued by the said railway company and secured by the said mortgage dated July 18th, 1881; and avers that the real owners and holders of said bonds are the Missouri Pacific Railway Company and the St. Louis Iron Mountain & Southern Railway Company, but as to the number that each of the said railway companys hold and own respondent is not informed.

Respondent further states that he is not informed as to how many of the bonds, issued under the mortgages of date September 1st, 1880, and of July 18th, 1881, have been exchanged for the consolidated mortgage bonds secured by the mortgage of which the Mercantile Trust Company is trustee and of date May 26th, 1888.

Respondent further admits that default in the payment of interest coupons attached to said bonds was made as alleged in plaintiff's petition in this behalf, and that on the 3rd day of last March said plaintiff, as petitioner, filed in the office of the circuit clerk of Stoddard county a certain bill seeking to collect said defaulted interest for himself; but, on the contrary, avers that it was not filed in behalf of all other similarly situated, and avers that said allegation was made only as a pretext for the institution of said suit in the manner and for the purposes as alleged in his pretended bill; and further avers that said petition or bill filed by said Merriam is without equity, against public policy, and fails to state a cause of action.

Respondent admits that he was on the 3rd day of March, 1893, and was up to and on the 4th day of said month and had been for many years prior thereto the president and general manager for the said St. Louis, Cape Girardeau & Fort Smith Railway Company and was and is yet the owner of the majority of the stock of said company.

Further, respondent admits that, being informed that a suit was

about to be filed in the office of the clerk of the circuit court of Stoddard county, he, for and in behalf of said railway company, did, on the 4th day of March, file in the office of the clerk of the court of common pleas the certain petition as set out in petitioner's petition in this behalf, but denies that it was filed for the purpose of defeating the jurisdiction of the said circuit court of Stoddard county and prevent it from obtaining through its proper officers the possession of said railway and its property and effects thereto belonging, but avers that said petition was filed for the express purpose of protecting said railway and its appurtenances from being wrecked and ruined by petitioner and his abettors in this behalf.

Respondent further avers that upon the filing of said petition he was, by the honorable judge of the said Cape Girardeau court of common pleas on March 4th, 1893, duly appointed receiver of said railway and its property of every description, and that he has been managing and operating the same as such receiver under the orders of said court ever since. Further, respondent avers that said petition filed in said court of common pleas and as set out in petition herein was at the May term of the said common pleas court amended by the filing of a new bill, a copy of which is annexed, as Exhibit "A," to the return of the railroad company, his co-respondent, and prayed to be made a part thereof as fully as if literally plead, and that the appointment of respondent as receiver aforesaid was duly confirmed in all things by an order of court duly entered of record, a copy of which is annexed as Exhibit "B" to the aforesaid return.

Respondent avers that he duly qualified by giving a bond in the sum of fifty thousand dollars, with approved security, as such receiver, and that he is now and has been ever since operating and managing said railway as such receiver.

Admits that process of summons was on March 7th, 1893, and not before issued by the circuit clerk of Stoddard county, in pursuance of the petition filed by the said E. G. Merriam in the circuit court of Stoddard county, and that it was made returnable to the September term, 1893, of said court, and admits that said summons was on the 8th day of March, 1893, served upon the defendant railway company and upon Leo Doyle, one of the respondents herein, on about the 9th of said month.

Respondent avers that to said petition, on or about the 5th day of September, 1893, at the September term of said court, defendant railway company therein filed its answer, a copy of which is attached to the aforesaid return of his co-respondent and marked Exhibit "C," and respondent avers that in said answer the defendant railway company made a full and complete tender of all the due and accrued interest on said bond up to date claimed to be held by petitioner, E. G. Merriam, with costs, and respondent's co-respondent, said company, here again offers to pay all of said accrued interest up to date and the legitimate costs incurred for the collection of same, and further avers that — will deposit the amount necessary to pay all of said back interests and costs in cash or by certified check in any bank designated by this honorable court within the

time fixed by the court, or said respondent will make such deposits with the clerk of this honorable court if so directed.

Respondent avers that said offer to pay said due and unpaid interest and the tender of the amount hereof is made to protect said railway and property for the interest of all creditors of said railway company and for no other purpose, and avers, further, that said action of said respondent in tendering full payment of the back interest on the bonds alleged to be owned by petitioner is and has been authorized and directed by the honorable Cape Girardeau court of common pleas.

Respondent further avers and states that the action of the said special judge, George Houck, had on the 13th of March, 1893, touching the order made by the Honorable John G. Wear, circuit judge of that court, in vacation, appointing Eli Klotz receiver of said railway and its property was, by this honorable court, in its decision rendered in the case of The State *ex rel. vs.* Alexander Ross *et al.*, sustained, and the appointment of the said Klotz as receiver by the said Honorable John G. Wear, for said railway and its company, held to have been on said day duly vacated.

Respondent avers, further, that this honorable court, in its decision rendered in the case aforesaid, held that the action of the said John G. Wear, judge as aforesaid, had on the 13th day of March, in the court-house of Stoddard county, relating to the confirmation of the said Klotz's provisional appointment as receiver of said railroad company, was void and of no effect.

Respondent denies that the said Honorable John G. Wear did, on the 24th day of July, 1893, reappoint and confirm the said Eli Klotz as receiver of said railway company, and denies that said Eli Klotz did on the same day qualify as such receiver.

Respondent denies that the said Stoddard county circuit court has used any or every endeavor within its power to take charge of, manage, and control, by and through its officers and agents, said railway and its property. He admits that he as receiver has now and has ever since his appointment had possession of all said property under the order and by the appointment of the honorable judge of the Cape Girardeau court of common pleas, and avers that said court was duly authorized and had full power to appoint respondent receiver as aforesaid, and avers that an appointment made by the said Honorable John G. Wear on the 24th day of July, 1893, was made without authority and after motions to change the venue of said cause had been duly filed based on the disqualification of the Honorable John G. Wear to sit and act as judge in said cause and before said motions had been disposed of and after a court of competent and co-ordinate jurisdiction with the said circuit court of Stoddard county had acquired jurisdiction over both the company and its property, having taken actual possession of the latter by this respondent or receiver, and that neither this respondent road nor Leo Doyle had any notice of said intended application or of its presentation.

Respondent denies specifically that the said Cape Girardeau court of common pleas is now threatening and about to make an order to

issue a large number of receiver's certificates, to the amount of two hundred and fifty thousand dollars, and make the same a lien on all the property of the St. Louis, Cape Girardeau & Fort Smith Railway Company, prior to and superior in right to the mortgage of your petitioner, upon claims which are neither an equitable nor a legal charge upon said property, and denies that said claims for which receiver's certificates are *are* alleged to be about to be issued are held for the use and benefit of the said Louis Houck and parties associated with him, but avers and admits that steps have been taken by respondent as receiver with the view of having an order made to issue receiver's certificates in the sum of two hundred and fifty thousand dollars or for such sum as the court might direct by order.

Respondent avers that large sums of money, to wit, thirty thousand dollars or more, are due on its back pay-rolls within six months prior to said property and railway going into the hands of respondent as receiver and certain other large sums of money, to wit, one hundred and fifty thousand dollars, expended in rebuilding and repairing bridges, culverts, and road-bed, washed out by the great floods of the spring of 1892, and other sums due and owing by said railway company for expenditures necessary to be paid in order to keep said railway in a safe running condition.

Respondent avers that had not the aforesaid expenditures been made at the time and in the manner that they were said road could not have been operated and its duties to the public could not have been performed, and that the greater amount of said claims now due and unpaid are claims due and owing to laboring men and for the want of which they must and will suffer unless speedily paid.

Respondent avers that notice had been given to all parties interested that an application would be made for an order as aforesaid for issuing receiver's certificates to the honorable judge of the Cape Girardeau court of common pleas, but denies as aforesaid that said honorable court ever threatened or intimated that such order would be made.

Respondent denies that a court of equity has no jurisdiction to entertain proceedings of the nature and character and for the purpose set forth in said railway company's petition filed in the said Cape Girardeau court of common pleas, and avers that said petition stated and does state facts sufficient to constitute a good, legal, and valid cause of action, and that in accordance with the prayer of said petition said respondent was appointed receiver as aforesaid; and respondent again avers that said petition was amended by filing a new petition at the May term of the court of common pleas, a copy of which is hereto attached as aforesaid, and his appointment as receiver was in all things duly confirmed, as will fully appear by the order hereto attached.

Respondent denies that the proceedings instituted by said railway company in the said Cape Girardeau court of common pleas are in excess of the jurisdiction and authority of the said court and denies that they were instituted for the express purpose of defeating and thwarting the jurisdiction of the Stoddard county circuit court,

and, on the contrary, avers that said court of common pleas is a court of general jurisdiction in all civil actions and has full power to do all things incident and necessary to the exercise of such power and jurisdiction touching all cases coming within its cognizance.

And avers further that said court has made no order or orders or done anything in said proceeding in excess of its power in the exercise of its functions as a court of general jurisdiction.

And, further answering, respondent denies every allegation not hereinbefore expressly admitted or denied.

This respondent avers that the pretended appointment of Eli Klotz as receiver on March 3rd, 1893, was made at Poplar Bluff, in Butler county, and not at Stoddard county; that it was made before any suit had been instituted by said Merriam; that it was null and void; that it was vacated by the circuit court of Stoddard county, and that no valid appointment of a receiver has been made by said court in said cause.

Respondent further avers that the relator has no lien upon any part of the railroad beyond or west of Lakeville, and avers that his efforts to cause and compel this court or the circuit court of Stoddard county to take possession of any part of it beyond Lakeville is in violation of the constitution of this State and of the United States and of the law of the land, all of which guarantees that no property shall be taken except by due process of law.

This respondent denies specifically all the allegations of fraud or collusion made in relator's petition herein as against him as receiver or president or as an individual. He adopts all the statements of fact and denials made in the return of his corespondent, The St. Louis, Cape Girardeau & Fort Smith Railroad Company, and prays they may be considered and that he may have the benefit thereof as fully as if he had set them out in full, and, having fully made return to the rule in this cause, prays that he be hence discharged with his proper costs in this behalf most wrongfully sustained.

LOUIS HOUCK,
By JOHN W. NOBLE,
GEO. D. REYNOLDS,
M. R. SMITH,
Attorneys for Louis Houck.

(Record, page 327.)

Which said return of Edward Hidden is in the words and figures following, to wit:

In the Supreme Court of Missouri.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas, *et al.*

Comes now Edward Hidden, one of the respondents in this cause, and for return to the rule to show cause why a writ of prohibition

should not issue as prayed in the suggestion for a writ of prohibition in the above-entitled cause, and for answer to said suggestion says that he is the trustee in a mortgage of the railway and income of The St. Louis, Cape Girardeau — Fort Smith Railway Company, respondent, under which one hundred and fifty thousand dollars of said company's bonds have been issued, and admits that the St. Louis, Cape Girardeau & Fort Smith is a railway corporation organized, named, owning, and having operated a line of railway as in said suggestion alleged, and that the said corporation made its several mortgages and issued its bonds as in said suggestion alleged.

Said Edward Hidden further admits that Louis Houck is and has been president of said corporation, and that he was on the 4th day of March, 1893, appointed by the judge of Cape Girardeau court of common pleas a receiver of said railway's property and said Edward Hidden further says that said Houck immediately thereafter, pursuant to the authority so conferred upon him, took out of the possession of said company and into his own possession in his capacity as such receiver all the property of said railway company, and now as such receiver retains and holds the same; and that said Houck was appointed receiver upon the bill set forth in said suggestion, and that said bill was filed by said railway company and said action was approved by the board of directors thereof; and said Edward Hidden further says that said action was instituted by said railway company in good faith and for the purpose of protecting and preserving the interests of all creditors and all other persons interested in said road, and that, believing said action was instituted solely for such purpose and that the appointment of Louis Houck as receiver would best preserve and protect said property by reason of the acquaintance of said Houck with said property and his good and economical management thereof in the past, and said Hidden having no further interest or concern in said action than that he should faithfully discharge his trust, he, the said Edward Hidden, did on the 7th day of March, 1893, enter his appearance in said cause and approve of the appointment of Louis Houck as receiver.

Said Edward Hidden further says that he had no knowledge prior to receiving a copy of the bill filed by said company after the filing thereof that said bill was intended to be or had been filed, and further says that said action was real and *bona fide* and not pretended.

And said Edward Hidden further admits that said Cape Girardeau court of common pleas has made a rule upon the parties to said suit to show cause why certain receiver's certificates should not issue with priority over the several mortgages on said railway, and that said rule is still pending.

And said Edward Hidden further says that the said Cape Girardeau court of common pleas was created by an act of the General Assembly of the State of Missouri, approved February 23, 1851, Laws of Missouri, 1850–'1, and that said act was amended by an act of the General Assembly of the State of Missouri, approved February 2,

1853, Laws of Missouri, 1852–'3, page 80, and that under said acts the said court had and has jurisdiction of said action instituted by said railway company, and said Hidden denies that the said proceedings, instituted and followed as aforesaid in said court of common pleas, are in excess of the jurisdiction and authority of said court.

And said Edward Hidden further says that he has not knowledge or information sufficient to enable him to form a belief as to the truth of the allegations contained in said suggestion not hereinbefore admitted or denied, and therefore denies the same.

EDWARD HIDDEN.
ALBERT N. EDWARDS,
Att'y for Edward Hidden.

(MEMORANDUM.—Here is inserted motion of relator for leave to use testimony taken in mandamus case.)

(Record, page 333.)

And afterwards, to wit, on the 18th day of October, 1893, the following proceedings were had in said cause, to wit:

STATE OF MISSOURI *ex Rel.* E. G. MERRIAM, Rel.,
vs.
ALEX. ROSS *et al.*, Resp.

Comes now the said respondent, The St. Louis, Cape Girardeau & Fort Smith Railway Company, by attorney, and, upon motion, it is ordered by the court that the said respondent be granted leave to amend its return to the rule to show cause by interlining certain words on page 13 of said return. Come also the said respondents, by attorney, and file their suggestions in opposition to the motion for leave to use testimony in mandamus case. Comes also the respondent The Mercantile Trust Company, by attorney, and files its return to the rule to show cause. Comes also the said relator, by attorney, and files his motion to strike out the return of the St. Louis, Cape Girardeau & Fort Smith Railway Company; also answer to separate return of Alex. Ross and answers and exceptions to the separate return of Louis Houck, and also brief in support of exceptions to separate answers, and, upon motion, it is ordered by the court that the said respondent be granted 5 days in which to file suggestions in opposition to the brief of relator on motion to strike out parts of returns.

Which said amendment is in words and figures as follows, to wit: "And that at the time when said appointment is alleged to have been made, motions to change the venue of said cause, on account of the disqualifications of said Wear, as judge, were then pending and undisposed of in said court, the same having been duly filed in said court in said cause on the 13th day of March, 1893, same being filed and made by this respondent and Leo Doyle, copies of which are herewith filed as Exhibit "D."

(MEMORANDUM.—Here appears the objections of respondent to motion asking leave to use testimony in mandamus case.)

(Record, page 336,)

In the Supreme Court of the State of Missouri, October Term, A. D. 1893.

STATE OF MISSOURI, at the Suggestion and Relation of EDWIN G. MERRIAM,
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas, *et al.*, Respondents.

Now comes The Mercantile Trust Company of New York, one of the respondents in this cause, and for return to the rule to show cause why a writ of prohibition should not issue as prayed in the suggestion for a writ of prohibition in the above-entitled cause says that it is the trustee in a certain mortgage or deed of trust executed on, to wit, the 26th day of May, 1888, by the Cape Girardeau Southwestern Railway Company, the predecessor of respondent The St. Louis, Cape Girardeau & Fort Smith Railway Company, to secure the payment of certain bonds mentioned and described in said mortgage and known as consolidated bonds, executed by said Cape Girardeau Southwestern Railway Company in an amount not exceeding one million dollars ($1,000,000.00); that of the said one million dollars ($1,000,000.00) of bonds authorized by said mortgage or deed of trust there have been executed and issued and are now outstanding and unpaid, to wit, nine hundred thousand dollars ($900,000.00) thereof, together with interest thereon; that said mortgage or deed of trust to this respondent is a lien upon and covers all of the railroad and property of respondent the said St. Louis, Cape Girardeau & Fort Smith Railway Company, subject, however, to the lien of certain prior mortgages and incumbrances thereon.

Respondent admits the institution of the proceedings in the said Cape Girardeau court of common pleas and the circuit court of Stoddard county, as set forth in the suggestion in the above-entitled cause.

Respondent says that on, to wit, the first day of March, 1891, the first day of September, 1891, the first day of September, 1892, and the first day of March, 1893, said respondent railway company defaulted in the payment of the installments of interest due on said four dates respectively on the said consolidated bonds issued and outstanding as aforesaid, and that thereafter, to wit, on the seventh day of March, 1893, the respondent filed the bill in the circuit court of the United States for the eastern division of the eastern district of Missouri in the usual form and according to the principles of and practice in equity for the foreclosure of the mortgage or deed of trust so as aforesaid executed to this respondent; that thereafter, in due course, the said respondent railway company filed in said United States circuit court for the eastern division of the eastern district of Missouri its answer to said bill of complaint so as aforesaid filed by this respondent, wherein it admitted substantially all of the allegations of the said bill of complaint, and, after

advising said United States circuit court of the institution of said proceedings in the said Cape Girardeau common pleas court and of the appointment of a receiver thereunder, subject thereto, submitted itself to the judgment of the said United States circuit court and to such decrees and orders as might be made by said last-mentioned court. Respondent filed herewith a copy of said answer of said respondent railway company, which is marked Exhibit "A." Respondent further avers that in due course it filed to the said answer a general replication; that said proceeding was instituted by this respondent in said United States circuit court for the purpose of foreclosing the mortgage to it so executed as aforesaid and obtaining on behalf of the bondholders it represents such relief as is consistent with the allegations contained in its said bill of complaint, and it avers that said United States circuit court has now full and complete jurisdiction over this respondent and over said respondent railway company for the purpose of affording such relief as may be proper.

Respondent further avers that, as trustee as aforesaid and under the provisions of the said mortgage or deed of trust to it executed, it holds, to wit, five hundred and thirty-nine thousand seven hundred dollars ($539,700.00) of the bonds secured by mortgages upon different divisions of the railroad of respondents' railway company to Leo Doyle as trustee; all of which were executed prior to the said mortgage or deed of trust executed to this respondent and referred to in the suggestion in said cause; that said bonds were exchanged for consolidated bonds of the character aforesaid and secured as aforesaid, but by the terms and provisions of the said mortgage or deed of trust executed to this respondent it holds the said bonds secured by said mortgages to said Leo Doyle, trustee, for use in any proceedings at law or in equity, where the use of the same becomes necessary for the protection of the rights and interests of the holders of said consolidated bonds.

Respondent further admits that said Cape Girardeau court of common pleas has made a rule upon certain parties, including this respondent, to show cause why certain receiver's certificates should not issue with priority over the several mortgages covering the railroad and property of respondent railway company, including the mortgages to this respondent, and that said rule is still pending. Respondent further says that as a defendant in the said suit pending in the said court of common pleas of Cape Girardeau county it has appeared and filed its answer substantially setting forth the facts herein averred. Respondent avers that, under the petition filed in said Cape Girardeau court of common pleas and brought on behalf of said respondent railway company, the said court of common pleas has no jurisdiction as a court of equity to entertain said petition or any proceedings in said cause or any proceedings for the purposes set forth in the said petition and amendments thereof of said respondent railway company, so far as this respondent is connected, and that all of the proceedings of the said court of common pleas, in so far as the same seek to affect this respondent or the

rights and interests by it represented, are without the jurisdiction of said court of common pleas and of no effect.

THE MERCANTILE TRUST COMPANY
OF NEW YORK,
By DICKSON & SMITH, *Attorneys.*

(MEMORANDUM.—Here follows Exhibit A to said return, being the answer of the railway company to the bill of the Mercantile Trust Company, filed in the United States circuit court for the eastern district of Missouri, as stated in said return; also a motion to strike out parts of the railway company's return.)

(Record, page 358.)

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS *et al.*

Answers and Exceptions to the Separate Return of Louis Houck.

The relator, for answer and exceptions to so much of the said separate return of the said respondent, Louis Houck, as it is material to make exception or answer unto, answering, says:

He excepts to that part of the 6th paragraph of said return wherein said respondent avers that the real owners and holders of said bonds are the Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, for that said return, if true, cannot influence in any way, either by addition or subtraction, the jurisdiction of the Cape Girardeau court of common pleas; that the respondent, said railway companies not objecting, cannot raise such question in his return.

Relator further excepts to that part of the 8th paragraph of said separate return of said respondents wherein it is averred that the bill filed by relator in the circuit court of Stoddard county is without equity and against public policy, and fails to state any cause of action, for that no such issue can be raised in this controversy, nor are such facts, if true, a good and sufficient return to the rule to show cause in this case.

Answering the 10th paragraph of said separate return, the relator says that the said respondent, Louis Houck, did, while acting as president of said St. Louis, Cape Girardeau & Ft. Smith Railway Company, file the suit of that company, as alleged in the petition, for a writ of prohibition herein after being informed that relator had begun his suit in the said circuit court of Stoddard county.

For exception to the eleventh paragraph of said separate return relator says that no amendment to the petition filed in the Cape Girardeau court of common pleas can in anywise enlarge the jurisdiction of said court.

Relator, for exception to the 14th paragraph of said separate re-

turn, wherein respondent avers that at the September term, 1893, of the circuit court of Stoddard county, his co-respondent, the railway company, filed its answer to the petition of the relator in his suit in said court and made a full and complete tender of the due and accrued interest on said bonds, together with legitimate costs incurred for the collection of same, and wherein it avers readiness to deposit the amount necessary to pay all of said interests and costs in any bank designated by this honorable court within the time fixed by the court, says that said facts, if true, are not cognizable in this controversy, nor do they constitute sufficient return to the writ herein issued, nor do said facts, if true, in anywise justify the unlawful and illegal exercise of jurisdiction by the Cape Girardeau court of common pleas.

Respondent excepts to the 19th, 20th, 28th, 29th, and 30th paragraphs of said separate return of said respondent Houck, for that they constitute no sufficient return to the writ herein issued, nor do they, if true, constitute authority for the unlawful exercise of jurisdiction by the Cape Girardeau court of common pleas over the property of the St. Louis, Cape Girardeau & Fort Smith Railway Company.

Wherefore, having fully answered and excepted to the said separate return of said Louis Houck, relator prays for a pre-emptory writ of prohibition restraining him, said Louis Houck, as in the original petition herein prayed.

H. S. PRIEST,
Attorney for Relator.

(MEMORANDUM.—Here is inserted brief for relator on exceptions to answer, motion to strike out, etc.; answer of Doyle; opposition of Hidden and Doyle to motion for leave to use testimony in mandamus case.)

(Record, page 369.)

STATE *ex Rel.* E. G. MERRIAM, Rel.,
vs.
ALEX. ROSS *et al.*, Resp.

Now, at this day, the court, having fully considered and understood the motion heretofore filed to strike out and for leave to use testimony, doth order that the motion for leave to use the testimony in the mandamus case be, and the same is hereby, overruled. It is further ordered by the court that both parties be granted leave to withdraw records and exhibits in the mandamus case and use the same in this case, and the court doth further order that the motion to strike out parts of the St. Louis, Cape Girardeau & Fort Smith Railway Company's return to the provisional writ herein be sustained as to paragraphs 11, part of 13, paragraphs 24, 40, 41, 42 (except last two lines), 43, and 44, and overruled as to paragraph 29. Paragraphs 22, 23, 25, 26, 27, and 28 are held under advisement pending argument in main case. The court doth further order that the motion to strike out parts of the suggestion for a writ of prohi-

bition herein be sustained as to the balance of said motion, and that the cause be set for hearing December 4, 1893.

Which said paragraphs 11, part of 13, paragraphs 24, 40, 41, 42 (except last two lines), 43, and 44, so stricken out, are in words and figures as follows, to wit:

11. Respondent further avers that said petitioner Merriam at the time that he claims to have purchased the aforesaid bonds was without means sufficient to buy the same, and that said bonds were transferred by George J. Gould, the agent of the said Missouri Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company, to petitioner, who then was and now is a salaried employee of said companies, without consideration and for the sole purpose of instituting suits to harass and ves this respondent and to wreck its line of railroad with the view of obtaining it without paying its value therefor.

13. Respondent admits that default in the payment of the interest coupons attached to said bonds was made as alleged in petitioner's petition in this behalf; admits that said Merriam did, on the 3rd day of March last, file, in the office of the clerk of the circuit court of Stoddard county, the so-called bill set out in full by him; denies that said petition was filed for the pretended purpose of collecting the back interest on said bonds, nor was it filed in the interest of others alleged to have been in a similar situation.

24. Respondent avers that said offer to pay said due and unpaid interest, and the tender of the full amount hereof, is made to protect its property for the interest of all its creditors and for no other purpose; and it further avers that said payment of interest herein, as well as in respondents Houck's return, is tendered under the directions and by the authority and order of the honorable judge of the Cape Girardeau court of common pleas.

40. Respondent avers further that the suit instituted by petition in the circuit court of Stoddard county, as aforesaid, is now pending in the Iron county circuit court on change of venue by stipulation, and will be for trial in said court at the October term, 1893, thereof; and further avers that the suit pending in said court of common pleas is also ready for trial, and avers that said petitioner has his remedies in either of said courts, and avers that he refuses to seek them in the ordinary way as the law directs, and avers that this extraordinary remedy by prohibition is resorted to solely for the purpose of harassing, vexing, and annoying this respondent and its receiver, and vexing, annoying, and harassing the Honorable Alexander Ross, judge of the said court of common pleas, and others, these respondents.

41. Respondent further avers that the action and conduct of the said Leo Doyle, trustee as aforesaid in the several mortgages herein described, has been fair and impartial and, as he considered, to the best interest of all the bondholders and creditors of said railway company, this respondent; and respondent avers that petitioner and his counsellors and abettors refuse to comply with the terms of the mortgages securing the bonds claimed by him in this, that said petitioner refused to apply, in the name of one-fourth of the bondholders

under said mortgages and as provided in said mortgages, to said Leo Doyle, as trustee therein, to have him take charge of said road and perform the necessary things by the terms of said mortgages, to collect said defaulted and unpaid interest, but, on the contrary, filed his petition in said circuit court of Stoddard county praying for the taking of an accounting of the back and accrued interest, due and unpaid, on his alleged bonds, secured by mortgages as aforesaid, and also prayed therein for the extraordinary remedy of the appointment of a receiver to take charge of respondent's entire line of railway, to run and operate the same, and to sequester the rents and profits thereof to the payment of the said due and unpaid interest on his said bonds.

42. Respondent avers and charges that petitioner-, by the aid and counsel of the St. Louis, Iron Mountain & Southern Railway Company and the Missouri Pacific Railway Company, have sought and are by the most extraordinary litigation seeking to subvert and use the courts of the State in carrying out the designs of said railway companies in seizing and appropriating the entire line of this respondent's railway and all its property for the pretended purpose of procuring the payment of not to exceed eight or nine thousand dollars in defaulted interest, and to the great and irreparable injury and damage of all of the bondholders and creditors of this respondent.

43. This respondent, further answering, says that the bonds which the said Merriam pretends to have and to own, secured by the two divisional mortgages aforesaid, have by virtue of said mortgages a lien upon the fifteen miles of the road from the city of Cape Girardeau to Delta, fifteen miles, and from Delta to Lakeville, in Stoddard county, a further distance of eleven miles, and no more; that it is expressly stipulated in each of said mortgages that nothing in them shall affect or be construed to be a lien upon the right of way and other property beyond the last-named point—that is, beyond Lakeville, in Stoddard county; that while the mortgage from Delta to Lakeville is a second mortgage over the road from Cape Girardeau to Delta, the one from Cape Girardeau to Delta is not a mortgage or lien upon the part from Delta to Lakeville, nor do either of said mortgages cover any portion of the road west of or beyond Lakeville. Reference is made to both of said mortgages as well as to the others referred to herein as fully as if they were set out herein in full. And this respondent avers that only five miles of the road covered by the first and second mortgages lie in Stoddard county or in the judicial circuit of which said county forms a part; and respondent avers that any action by said judge of the circuit court of Stoddard county or by said court itself attempting to seize out of the possession of this respondent under either of said divisional mortgages all of said railroad or any other part thereof than that expressly named in said divisional mortgages was and is and must be against the contract expressed in said last-named mortgages and against the express provisions of both the constitution of Missouri and the Constitution of the United States providing that no person shall be deprived of property without due process of law, and is against the law of the land.

44. Respondent avers that said Merriam has no interest, right, or claim of any kind whatever to the seventy-three miles and over beyond Lakeville to Hunter's, its junction with the Current River railroad, nor did nor could the circuit court of Stoddard county ever acquire any jurisdiction over that part of the road from and beyond Lakeville in the Merriam suit, notwithstanding which it was attempted by said Merriam to have said court take possession and appropriate the revenues under his pretended bill of the whole of said road, and it is now sought to accomplish the same thing through the process of this court.

Which said paragraph 29, which was overruled, is in words and figures as follows, to wit:

29. Respondent further avers and states that the action of said special judge, George Houck, taken and had on the 13th of March last, relating to the order made by the Honorable John G. Wear, judge of the circuit court of Stoddard county, in vacation, attempting to appoint the said Eli Klotz receiver of said railway and its property, in setting aside and vacating the order of such appointment of the said Klotz was, by this honorable court in its decision heretofore rendered in the case of the State *ex rel. vs.* Alexander Ross *et al.*, sustained, and the appointment of the said Klotz as receiver by the said Honorable John G. Wear was held to have been by said special judge, George Houck, and on the 13th day of March last as aforesaid duly set aside and vacated; and respondent avers that this honorable court, in its said decision, held that the action of said John G. Wear, judge as aforesaid, had, on the 13th day of March last, in the court-house of Stoddard county, after the circuit court for that term had been duly adjourned by Special Judge George Houck, relating to the confirmation of the said Klotz's provisional appointment as receiver of said railroad company and its property, was void and of no effect.

Which said paragraphs 22, 23, 25, 26, 27, and 28, which were held under advisement, are in words and figures as follows, to wit:

22. Respondent avers that on or about the 5th day of September last, in open court, it filed its answer to the petition of said Merriam in the circuit court of Stoddard county, a copy of which is hereto attached and marked Exhibit "C" and is prayed to be made a part of this return; and respondent avers that in said answer it, the defendant, therein made a full and complete tender of all the due and accrued interest on said bonds up to date claimed by petitioner Merriam, with costs.

23. Respondent now and here again offers to pay all of said accrued interest up to date and all costs incurred that would be lawful for it to pay; and avers, as is averred in receiver's return hereto, that the necessary amount to pay all of said back interest and costs will be deposited either in cash or by certified check in any bank that may be designated by this honorable court within the time fixed by the court, or will pay to or make such deposit with the clerk of this honorable court if so directed.

25. Respondent further avers that all the defendants in the cause instituted by it in the Cape Girardeau court of common pleas and

wherein Louis Houck was appointed receiver have appeared and filed pleas thereto, and avers that petitioner Merriam, notwithstanding his alleged interest in certain bonds involved as an issue in said cause and having full notice of the pendency of said cause, has failed and refused to intervene or otherwise appear to said proceeding and file answer or other plea to the petition therein, and avers that neither he nor any one in his interest has, by motion, plea, or otherwise, interposed any plea to the jurisdiction of said common pleas court in said cause, and that the only paper filed therein by the said Merriam or any one representing him was filed on or about March 9th, 1892, by the attorneys of the aforementioned Eli Klotz, then claiming to be receiver of the property of this respondent by the appointment of the circuit court of Stoddard county, wherein was suggested the appointment of said Klotz receiver as aforesaid, and praying for an order of delivery to him, the said Klotz, of the property then in possession of Louis Houck as receiver.

26. Respondent avers that said motion was filed on the 9th of March last, five days after the appointment of respondent Houck as receiver, and that the same has never been called up or any argument made thereon, and that it has been from time to time continued and yet is pending in said court; and respondent avers that said Merriam has at all times since the execution of the deeds of trust under which he claims, as set out in his so-called bill, and is now, both in said suit in said common pleas court and elsewhere, as to the said bonds and coupons claimed by said Merriam, legally and fully represented by said Leo Doyle as trustee, who has at all times stood ready to represent said bonds and coupons and each of them in any and all proceedings and to faithfully execute the trust assumed by him.

27. And this respondent, for further return in this behalf, states that since the said action in the said common pleas court was commenced said Leo Doyle, one of the defendants therein and who is the trustee in said divisional mortgages or deeds of trust under which said Merriam, relator herein, claims to hold said bonds and coupons described by him, has appeared in said action in said common pleas court and has, as said trustee, answered said petition of this respondent and has, by his cross-petition, set up in due form and according to their true and legal effect all of the provisions of said divisional mortgages wherein he, said Doyle, is trustee, and otherwise legally pleaded for relief by the prosecution of said order of receivership under which said Houck is appointed and acting, and by such other orders, decrees of foreclosure and sale, judgments and proceedings, and the exercise of its original jurisdiction as to equity and justice appertain and to the court of common pleas seems meet, and that said last-named court has entertained said answer and cross-bill and was, when the present application for a writ of prohibition was filed, proceeding in all matters relating to said receivership as well as all other matters in said action under said cross-petition and answer as well as under said original and said amended petition filed therein by this respondent.

28. Respondent further avers that the jurisdiction of said common

pleas court is a question authorized by the statutes of this State to be raised by answer or by the intervention in the proper manner by petitioner Merriam, and until the same is done as directed by the statute aforesaid a writ of prohibition cannot be invoked to determine such question.

(Record, page 379.)

In the Supreme Court of Missouri, October Term, 1893.

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas, *et al.*, Respondents.

Comes now Leo Doyle, one of the respondents in this cause, and for his amended return to the rule to show cause why a writ of prohibition should not issue as prayed for in the suggestion for a writ of prohibition in the above-entitled cause and for answer to said suggestion, says that he is the trustee in the several mortgages made and executed by the St. Louis, Cape Girardeau & Fort Smith Railway Company, as is alleged in said suggestion.

Admits that the said railway company is a corporation organized and has operated a line of railway from the city of Cape Girardeau, as in said suggestion alleged, and that the said company under different name made its several mortgages and issued its bonds as in said suggestion alleged. Said respondent further admits that Louis Houck is and has been the president of said corporation, and that he was on the 4th day of March, 1893, appointed by the judge of the Cape Girardeau court of common pleas a receiver of said railway property; admits that said Louis Houck immediately thereafter, pursuant to the authority so conferred upon him, took out of the possession of said company and in his own possession in his capacity as such receiver all the property of said railway company and now retains and holds the same; admits that Louis Houck was appointed receiver on the bill set forth in said suggestion, and that said bill was filed by said railway company and said action was approved by the board of directors thereof; and for further answer *that* respondent says that said action was instituted by said railway company in good faith and for the purpose of protecting and preserving the interests of all its creditors and all other persons interested in said road, and believing that said action was instituted solely for such purpose, and that the appointment of Louis Houck as receiver would best preserve and protect said property by reason of his acquaintance with the same and his economical management of the same in the past, and believing that said Houck would faithfully discharge his trust as such receiver, he, the said Leo Doyle, did enter his appearance in said cause and approved the appointment of said Louis Houck as receiver of said railway by the Cape Girardeau court of common pleas. Respondent further answers and says that the said Cape Girardeau court of common pleas was created

by the act of the General Assembly of the State of Missouri, approved February 23rd, 1851, and that said act was amended by an act of the General Assembly of the State of Missouri, approved February 2nd, 1853, and that under said acts and the adjudication of this court upon said acts, the said Cape Girardeau court of common pleas was and is vested with the jurisdiction and the power to adjudicate the matters and things alleged in said bill filed by said railway company; and this respondent denies that the said proceedings, instituted and followed in said court of common pleas, are in excess of the jurisdiction and authority of said court. Respondent further says that at the May term of said court of common pleas, the respondent railway company filed in said court an amended bill, setting out in detail the reasons for asking said court for a receiver; that at said May term this respondent filed in said court his answer and cross-bill to said amended bill of said railway company, as follows:

In the Cape Girardeau Court of Common Pleas, May Term, 1893.

STATE OF MISSOURI, } ss:
County of Cape Girardeau, }

ST. LOUIS, CAPE GIRARDEAU & FT. SMITH R'Y CO., Plaintiff,
against
LEO DOYLE, Trustee; EDWIN HIDDEN, Trustee, and THE MERCANTILE TRUST COMPANY OF NEW YORK, Trustee, Defendants.

Now, at this day, comes defendant Leo Doyle, trustee in the above-entitled case, and for his separate answer and cross-bill to plaintiff's petition herein says that the St. Louis, Cape Girardeau & Ft. Smith Railway Company was originally organized under the laws of the State of Missouri in the year 1880, under the name and style of the Cape Girardeau Railway Company, but afterwards its name was changed to the Cape Girardeau Southwestern Railway Company, and that more recently the name of said railroad was changed — the St. Louis, Cape Girardeau & Ft. Smith Railway Company; that all of said changes of name were made in pursuance of the law of the State of Missouri, and that under said name of "St. Louis, Cape Girardeau & Ft. Smith Railway Company" it began this suit.

Defendant further states that the line of said railroad is about one hundred (100) miles in length, beginning at the City of Cape Girardeau and running from thence through the southern portion of Cape Girardeau county into and through the southern corner of Bollinger county into and through Wayne to Williamsville in said county of Wayne, where the said railroad crosses the main line of the St. Louis, Iron Mountain and Southern railway, and from thence into the county of Carter to Hunter, the terminus thereof and the point of junction with the Kansas City, Ft. Scott and Memphis railway.

Defendant further states that said railroad was built at different times and by sections or divisions, and that each section or division

was bounded in order to raise money for its construction and equipment.

Defendant further states that under the name of the Cape Girardeau Railway Company it made, executed, and delivered its certain mortgage bearing date September 1st, 1880, to this defendant as trustee on the division of said road running from the city of Cape Girardeau to Delta, a distance of about fifteen (15) miles; that said mortgage was so made and executed to this defendant as trustee to secure one hundred thousand (100,000) dollars of first-mortgage bonds, which said bonds are fully described in said mortgage, and that said mortgage is hereto attached and marked Exhibit "A," and this defendant prays the same may be made a part of this answer and cross-bill as fully as if set out in the very words thereof.

Defendant further states that on or about the 18th day of July, 1881, said petitioner in aid of and during the period of its construction made, executed, and delivered under the name of the Cape Girardeau Southwestern Railway Company its certain other mortgage to this defendant as trustee to secure an issue of eighty thousand (80,000) dollars of bonds on that part of its said line of railroad extending from Delta, in Cape Girardeau county, to Lakeville, in Stoddard county, a distance of about eleven (11) miles. Said mortgage is hereto attached and marked Exhibit "B," and is also prayed to be made a part of this answer and cross-bill as fully as if copied herein.

Defendant further states that afterwards, to wit, on or about the 27th day of May, 1882, and in aid of the further extension and construction of said railroad it made, executed, and delivered under the name and style of the Cape Girardeau Southwestern Railway Company to this defendant, as trustee, its certain other mortgage for the purpose of securing an issue of two hundred thousand (200,000) dollars of bonds on its line of railroad from Lakeville, in Stoddard county, to the St. Francois river, in Wayne county, a distance of about twenty-two (22) miles.

This mortgage is also hereto attached and marked Exhibit "C," and it is again prayed that the same may be made a part of this answer and cross-bill as fully as if set out in full.

Defendant further states that afterwards, to wit, on or about the 1st day of December, 1885, the petitioner herein, under the name and style of Cape Girardeau Southwestern Railway Company, made, executed, and delivered its certain other mortgage to secure the payment of an issue of two hundred and fifty thousand (250,000) dollars of bonds on said line of railroad extending from the city of Cape Girardeau to Wappepello, in Wayne county, and the right of way from there to Williamsville, in said county, to the main line of the St. Louis, Iron Mountain & Southern railway, a distance of fifty-five (55) miles; that the same was in aid of the further extension and construction of said railroad and this defendant was made the trustee in said mortgage, and the same is hereto annexed and marked Exhibit "D;" and he again prays that it, too, may be made a part of this answer and cross-bill as fully as if set out in *hæc verba*.

Defendant further states that a large number of the coupons of

said bonds secured as aforesaid by said mortgages are held by various persons and parties to this defendant unknown, and he is informed and on information states that there is now due and unpaid about the sum of five hundred thousand (500,000) dollars of said bonds and coupons outstanding on which the interest is unpaid.

Defendant further states that the foregoing bonds and the mortgages securing them, as well as the coupons thereto attached or accompanying said bonds, are underlying security upon the various sections or divisions of the road as in said mortgages described and upon said sections and divisions of said road, the same constituting a first lien, and that said liens in point of priority are governed by the date of the mortgage creating it, and that all of the aforesaid liens are prior in time and in right to the lien created by the consolidated mortgage made and executed by the petitioner, as hereinafter set out, for the purpose of retiring the bonds issued under the aforesaid mortgages above referred to.

Defendant further states that on or about the first day of September, 1888, the petitioner, under the name and style of the Cape Girardeau Southwestern Railway Company, made and executed its certain mortgage covering and including the entire line of road, extending from the city of Cape Girardeau to Hunter, in Carter county, and all branches and sections thereto belonging; that said mortgage was made and executed to secure an issue of one million (1,000,000) dollars of consolidated bonds resting upon the entire line of said railroad to be used for the purpose of taking up the said divisional and underlying bonds issued in the manner and for the purpose aforesaid, and further to be used in aid of construction and extending said road from the main line of the St. Louis, Iron Mountain & Southern railway to Hunter, as aforesaid; that of said issue of bonds this defendant is informed and states the fact from information that there were issued by petitioner and certified by the trustee in said mortgage of said bonds from one (1) to eight hundred and eighty-nine (889), both numbers inclusive, and that they were from time to time sold and delivered to various parties to this defendant unknown; that said last-named mortgage was executed and delivered to the co-defendant, The Mercantile Trust Company of New York, as trustee. A copy of said mortgage is hereto attached and marked Exhibit "E," and for the greater certainty he again prays that the same may be made a part of this answer and cross-bill as fully as if set out in words.

Deponent further states that afterwards, to wit, on the 14th of January, 1889, a certain correctional mortgage was made to correct certain dates that were erroneously written in said last-named mortgage, a copy of which is also hereto attached and marked Exhibit "F" and made a part of this answer and cross-bill.

Defendant further states that he is informed that afterwards, on the — day of August, 1890, a second mortgage income bond of one hundred & fifty thousand (150,000) dollars was placed upon the entire road of petitioner herein, which mortgage was made under the name of the Cape Girardeau Southwestern Railway Company; that the same was executed and delivered to Edward Hidden, of

the city of St. Louis, as trustee, and was for the purpose of securing one hundred & fifty thousand (150,000) dollars' worth of income bonds, a copy of which mortgage is hereto attached and marked Exhibit "G," and is also made a part of this answer and cross-bill.

Defendant further states that on or about the — day of ——, 1890, the petitioner, under the name and style of St. Louis, Cape Girardeau & Ft. Smith Railway Company, made and executed a certain other mortgage or deed of trust to this defendant as trustee to secure bonds to the amount of eight hundred & fifty thousand (850,000) dollars; that said bonds were issued for the purpose of raising money to aid in the construction of the Arkansas extension of its railroad; that said mortgage was and is placed over the entire line of petitioner's railroad, including the surveyed and projected lines of said railroad.

Defendant is informed and states that fact from information that about two hundred & twenty-five thousand (225,000) dollars bonds were issued and sold and are now outstanding and in the hands of different persons; that said mortgage is hereunto attached and marked Exhibit "H," and is also made a part of this answer and cross-bill as fully and completely as if set out in full.

Defendant further states that the petitioner is indebted to a great number of persons in various sums, amounting in the aggregate to about seventy-five thousand (75,000) dollars, for current accrued indebtedness which is now due and unpaid,

Defendant further states that he is informed and upon information states that plaintiff is indebted to various persons on account of improvements, betterments, and operative expenses of its road over and above the mortgage indebtedness hereinbefore referred to in a large sum, to wit, about the sum of one hundred and eighty thousand (180,000) dollars, and that a part of said one hundred and eighty thousand (180,000) dollars was for the purchase-money of steel rails to be used between Williamsville and Hunter station, on said road.

Defendant further states upon information that there is due on the pay-rolls of plaintiff the sum of about forty thousand (40,000) dollars in favor of employees of plaintiff, the exact amount of which this defendant is unable now to state.

Defendant further states that the plaintiff is embarrassed and has been unable to pay the accruing interest on its bonds for several years, and is also unable to pay its existing floating indebtedness, which indebtedness in the aggregate, this defendant is informed and believes, will amount to nearly four hundred thousand (400,000) dollars.

Defendant further states that immediately upon the filing of the plaintiff's original bill in this court in this cause he entered his appearance as a defendant herein, believing then and still believing that it was in the interest of all parties concerned that a receiver should be appointed for plaintiff to prevent great and irreparable injury to the holders of the bonds secured by the mortgages in which

he is made trustee, as well as all other creditors of equal standing and right.

Defendant further states that in order to protect the interest of all concerned and interested in the property of plaintiff and to prevent a multiplicity of suits and that all of the aforesaid property belonging to the plaintiff might be wisely and equitably handled and administered, defendant believed and still believes it best for the interest of all its creditors as well as the holders of the bonds aforesaid that a receiver should be appointed by this court to take charge and administer all of said property of whatsoever kind and description, and to empower and to direct said receiver to take possession of said entire property and to preserve, operate, and manage the same under the direction of this court, and that on the final hearing of this cause he prays this court will decree the sale of said entire property, whether such decree shall judicially foreclose said general mortgage or the mortgages of which this defendant is trustee or *whether such decree shall judicially foreclose said general mortgage or the mortgages of which this defendant is trustee or* whether such decree shall dispose of said property as a trust fund on general equitable principles; and he further prays that the court may cause all the liens upon said property or any part thereof and all rights, claims, and equities of all persons interested therein to be ascertained definitely and determined, and that the proceeds arising from the sale of such property, if the same shall be sold, may be applied under the orders of this court according to the rights, interests, and equities of parties or persons interested in said fund, and for such other relief as to the court may seem right and just.

R. B. OLIVER,
For Trustee Leo Doyle.

That he has acted in good faith with this relator and all others interested in said property; that he then believed and still believes that under the adjudications of this court and the statute of this State said court of common pleas had jurisdiction of said cause, and that said receiver was best fitted to operate said property for the owners and creditors thereof; that said cross-bill was filed on the 22nd of May, 1893, and that thereafter, to wit, on the 27th day of May, the said Cape Girardeau court of common pleas confirmed and made the appointment of said Houck as receiver final.

Respondent further states that this relator has never requested him to take charge of said property because of a failure to pay the interest on said bonds.

And respondent denies that he has acted in bad faith of failed in any way to do his duty as trustee or that he is under the influence of said Houck.

And respondent further denies each and every allegation in said suggestion contained that has not been directly admitted.

Wherefore, having fully answered, he prays to be discharged.

R. B. OLIVER,
Att'y for Respondent Leo Doyle.

(Record, page 390.)

In the Supreme Court of Missouri.

STATE OF MISSOURI *ex Rel.* EDWIN G. MERRIAM, Relator,
vs.
ALEXANDER ROSS *et al.*, Respondents.

It is stipulated that the following facts may be considered as proved in said cause and so treated by the supreme court, the relevancy and materiality of this testimony, however, not being admitted by either party against whom said admissions are supposed to bear.

1st. That on the 4th day of March, 1893, Mr. George Houck wired to his brother, Louis Houck, in substance as follows:

"Eli Klotz has been appointed receiver of your road. Do you know it?" Said telegram was not delivered to Louis Houck until late in the afternoon of the 4th of March, after which time Louis Houck wired from Cape Girardeau to his brother George, at Bloomfield, in Stoddard county, asking for particulars; that in answer to this telegram George Houck wired to his brother Louis in a telegram of about 12 or 15 words the style of the case—that is to say, the name of the parties, plaintiff and defendant, the name of the receiver, and the amount of his bond, and that these are all the particulars concerning the case of Merriam *vs.* The St. Louis, Cape Girardeau & Fort Smith Railway Company and Leo Doyle, trustee, which were wired by George Houck to Louis Houck on the 4th of March, it being admitted that the suit referred to is the one instituted by the present relator in the Stoddard county circuit court.

2nd. It is stipulated as a fact in this cause that the petitions of The St. Louis, Cape Girardeau, and Fort Smith Railway Company and the order of Judge Ross thereon appointing Louis Houck receiver, and the bond of Louis Houck as receiver, were handed to the clerk of the Cape Girardeau court of common pleas about half past seven o'clock on the evening of March 4th by Judge Alexander Ross, with directions by the judge to the clerk to file all of them, they being handed to the clerk in his office at Cape Girardeau by said judge on said day; and that thereupon the clerk filed all of said papers of record and that there was no other filing thereof.

3rd. It is furthermore stipulated as a fact in the case that the petition in the Merriam suit was handed to Honorable John C. Wear, of the circuit court of Stoddard county, at Poplar Bluff, in Butler county, where said judge resided and within his judicial circuit, on March 3rd; that it had not then been filed in court or with the clerk; that the judge signed the order appointing Eli Klotz receiver at Poplar Bluff, in Butler county, in vacation, the court of Stoddard county not being in session, and handed it with the petition to one of the attorneys for Mr. E. G. Merriam, the plaintiff in said suit and relator in this suit, with instructions to file the same, accompanied with a letter to the clerk of the Stoddard county circuit court, signed by Judge Wear, directing the clerk, if he did not know how to make out the notice in the case as

to the provisional appointment of receiver and the rule to show cause, which was returnable on March 13th in term time, to wait until Judge Wear would come over to Bloomfield the next week; that thereupon the attorney for Mr. Merriam sent the petition, the order of the appointment of Klotz and the letter by private messenger to the clerk of the circuit court of Stoddard county, at Bloomfield, in said county, where they arrived at about half past seven on the evening of the 3rd of March, and were then first filed by said clerk of record in said court; that on the 7th of March summons was issued by said clerk on the petition and a notice drawn up and signed by the clerk requiring the railroad and Doyle to appear and show cause why Klotz should not be confirmed as receiver on Monday, the 13th of March, before the circuit court of Stoddard county, in session at Bloomfield in said county, which said order and summons were served on a station agent of the railroad on the night of March 7th, and on Mr. Houck, the president, and Leo Doyle, at Cape Girardeau, Missouri, on March 8th and 9th, 1893.

4th. That on March 13th, 1893, Leo Doyle and the St. Louis, Cape Girardeau & Fort Smith Railway Company filed in the circuit court of Stoddard county motions for change of venue, based on the disqualification and prejudice of Judge Wear, and prayed for a change of venue in the Merriam case from him in those grounds; that said motions and cause was continued by Judge Houck, special judge, on March 13th, to the next term of said court, and that said George Houck, before adjournment of said court, on March 13th, 1893, to court in course, entered and signed an order continuing all motions and causes not otherwise disposed of to said court in course.

5th. That the order averred by relator Merriam to have been entered up by the Honorable John G. Wear, reappointing and confirming Eli Klotz as receiver on the 24th of July, 1893, was, in point of fact, written out and signed by Judge John G. Wear outside of the limits of Stoddard county; that said order was made in vacation; that neither of the defendants, Leo Doyle of The St. Louis, Cape Girardeau and Fort Smith Railway Company, had any notice of the intended application for said order, nor were either of them present in person or by counsel at the time or place when the same was made, and that the same was filed by the clerk of the Stoddard county circuit court on the 25th day of July, 1893, but that neither of the defendants above named had any notice of the fact of it having been issued, entered up, or filed until the service upon them of the alternative writ of prohibition in the present cause, which service was made some time after the 25th of July and before the first Monday in August, 1893.

6th. Subject to objection as to relevancy, but the competency being hereby admitted, either party may introduce in evidence at the hearing either or any part of the copies of records on file of the proceedings of either action in either of the lower courts, and the copies of the mortgages filed in the case, together with any certified copies of documents, records, or proceedings filed with the papers or introduced in evidence in the mandamus proceedings heretofore

filed in this court, but not individual testimony other than here stipulated for.

GEO. D. REYNOLDS &
JOHN W. NOBLE,
Atty's for Respondents Named.
H. S. PRIEST,
Att'y for Relator.

Nov. 23, 1893.

(MEMORANDUM.—Here is inserted transcript of record of the case pending in the Stoddard county circuit court, consisting of petition, deed of trust, first mortgage, provisional appointment of Klotz, receiver; motions of the several respondents to set aside provisional order and exhibits thereto, being the bill in the common pleas of Cape Girardeau county; order appointing Houck receiver, his bond as receiver, motion for change of venue, order of Judge Wear setting aside orders of special judge George Houck appointing Houck receiver made March 13, 1893; order confirming appointment of Klotz, order denying motion for change of venue, order appointing Klotz receiver, filed July 25, 1893; bond of Klotz, receiver; answer of the railway company and exhibits thereto, being petition in the court of common pleas of Cape Girardeau county; order appointing Houck and his bond, answer of Doyle, stipulation and order changing venue to Iron county.)

(Record, page 529.)

And afterwards, to wit, on the 4th day of December, 1893, the following further proceedings were had in said cause, to wit:

STATE *ex Rel.* E. G. MERRIAM, Rel.,
vs.
ALEX. ROSS *et al.*, Resp.

Come now the said parties, by attorneys, and, after argument herein, submit these causes to the court.

And afterwards, to wit, on the 24th day of March, 1894, the further following proceedings were had in said cause, to wit:

In the Matter of the STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM, Relator,
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas; The St. Louis, Cape Girardeau & Ft. Smith Railway Company, Louis Houch, President of said Railway Company as well as Pretended Receiver of all the Assets Thereof under Appointment of the said Judge of the said Court of Common Pleas; Leo Doyle, The Mercantile Trust Company, and Edward Hidden, Respondents.
} Prohibition.

Now, at this day, comes again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently ad-

vised of and concerning the premises, doth consider and adjudge that the writ of prohibition as prayed for by the relator herein be, and the same is hereby, granted, and that the said relator recover against the said respondents his costs and charges herein expended and have therefor execution. (Opinion filed.)

(Record, page 530.)

Which said opinion is in the words and figures as follows, to wit:

In the Supreme Court of Missouri, In Banc, October Term, 1893.

STATE OF MISSOURI *ex Rel.* E. G. MERRIAM, Petitioner,
vs.
ALEXANDER ROSS, Judge, *et al.*, Respondents.

Opinion.

This is an application for a writ of prohibition. On the third of March, 1893, the relator, who is the holder of seventy-six thousand two hundred dollars of the bonds of the St. Louis, Cape Girardeau & Ft. Smith Railway Co., secured by deeds of trust on portions of the railway and other property of said company, instituted a suit in the circuit court of Stoddard county against said railway company, Leo Doyle, the trustee in said deed of trust, and the Mercantile Trust Company of New York, trustee in other deeds of trust, made by said company on its property, to recover defaulted interest on said bonds under the following provisions contained in said deeds of trust:

"That if the interest on any of the bonds so to be issued shall not be paid by the party of the first part when the same shall become due, and if such interest shall remain in arrears for three months, or in case the principal of said bonds or any of them shall not be paid at their maturity, then it shall be lawful for said party of the second part, his successor or successors in trust on the written request of the holders of not less than one-fourth part of said bonds then outstanding, to take possession of all and singular said premises, property, and franchises so conveyed, and as the attorney-in-fact or agent of the said party of the first part, by himself, his agent or agents or substitutes, duly constituted, have, use, enjoy, and operate the same, making from time to time all useful repairs, alterations, and additions, and, after deducting the expenses of such use, repairs, alterations, and additions, and the costs and charges of such taking possession and a reasonable compensation for the services of said trustee in such taking of possession and while in possession, which shall not exceed $1,500 per annum, apply the proceeds thereof to the payment of the principle and interest of said bonds issued thereunder, remaining unpaid, and which have or may have become due, and upon the written request of the holders of at least one-fourth of said bonds issued hereunder and then outstanding and unpaid, shall cause said premises, real and personal

estate, rights and franchises, to be sold at public auction, in the city of Cape Girardeau, given at least 12 weeks' notice," etc.

The petition, setting forth the plaintiff's cause of action, verified by affidavit, together with certified copies of said deeds of trust, were on that day presented to the Hon. John G. Wear, judge of said circuit court, at chambers, in vacation of said court, and thereupon he made a provisional order in writing appointing Eli Klotz receiver of said railway company, directing him forthwith to take possession of said railway, and restraining said company and its officers from in any manner transferring or disposing of the property, and directing the clerk of said circuit court to issue a sommons or notice to said defendants returnable Monday, the 13th of March, 1893, to appear at Bloomfield, the county seat of said county, before the said circuit court, and show cause, if any they have, why the appointment of said receiver should not be confirmed. The petition, together with the exhibits and the said order, were on said third of March, 1893, filed in the office of the clerk of said circuit court. On the next day (March 4) George Houck, an attorney, and a brother of Louis Houck, the president and general manager of said railway company and the principal owner of its stock, telegraphed to the latter advising him of the institution of said suit, and that Klotz had been appointed receiver and the amount of bond required. On the same day the following petition was presented to the defendant, the Hon. Alexander Ross, judge of the Cape Girardeau court of common pleas, in chamber-:

In the Cape Girardeau Court of Common Pleas within and for the County of Cape Girardeau and State of Missouri.

ST. LOUIS, CAPE GIRARDEAU & FT. SMITH RAILWAY COMPANY, Plaintiff,
vs.
LEO DOYLE, ED. HIDDEN, & MERCANTILE TRUST COMPANY, of New York, Defendants.

In the Court of Common Pleas of the County of Cape Girardeau, Missouri, May Term, 1893.

Your petitioner, the said St. Louis, Cape Girardeau & Fort Smith Railway Company, states that the St. Louis, Cape Girardeau & Fort Smith Railway Company was organized under the laws of the State of Missouri in 1880; that it was originally organized under the name and style of the Cape Girardeau railway; that afterwards its name was changed to the Cape Girardeau Southwestern railway, and that more recently the name of said railroad was changed to the St. Louis, Cape Girardeau & Fort Smith Railway Co. under the laws of said State of Missouri.

Your petitioner further states that the said railroad issued $100,000 of first-mortgage bonds, bonds under the name and style of Cape Girardeau Railway on its division of road from Cape Girardeau to Delta, and that Leo Doyle is trustee in said deed of trust securing

said bonds, and that said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that it issued $80,000 of bonds on its line of railroad from Delta to Lakeville, a large portion of which bonds are outstanding, and that Leo Doyle is trustee of and in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that it issued $200,000 of bonds on its line of railroad from Lakeville to the San Francois river, and that Leo Doyle is trustee in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that it issued $230,000 of bonds on its division of road from the San Francois river to the main line of the Iron Mountain railroad, and that Leo Doyle is trustee in the deed of trust by which said bonds are secured, and said deed of trust is hereto attached and made a part of this petition.

Your petition- further states that a large number of the said bonds and a large number of the coupons of the said bonds are still unpaid and held by various parties to your petitioner unknown, to wit, the sum of $500,000, and that the said coupons and bonds are an underlying security upon said property. Your petitioner further states that afterwards, in 1888, $1,000,000 of consolidated bonds were issued upon the said entire railroad of petitioner for the purpose of taking up the said underlying bonds and construct- the said railroad from the main line of the St. Louis, Iron Mountain & Southern railroad to Hunter, a junction with the Kansas City, Fort Scott & Memphis railroad, and that many persons, to your petitioner unknown, are large owners of said bonds, to wit, the amount of $1,000,000, and the Mercantile Trust Company of New York is trustee in said bonds for the benefit of the holders thereof, and said deed of trust is hereto attached and made a part of this petition. Your petitioner further states that afterwards, to wit, in 1880, a second-mortgage income bond of $150,000 was placed upon the said railroad, and that the said mortgage income bonds have been issued, and that Edward Hidden is trustee in said bonds for the benefit of the holders of the same, and that said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that an Arkansas extention on bind of $850,000 is authorized on its road, and $225,000 of said bonds have been issued on said railroad, and said deed of trust is hereto attached and made a part of this petition.

Your petitioner further states that the said St. Louis, Cape Girardeau & Ft. Smith Railway Company is about one hundred miles long, extending through the counties of Cape Girardeau, Bollinger, Stoddard, Wayne, and Carter, and has an equipment of cars and locomotives, the cost of which was $250,000, and that the value of the same to the company is as much. Your petitioner further states that the St. Louis, Cape Girardeau & Ft. Smith Railway Company is indebted in the sum of $180,000 on floating debts to various parties paid out in its behalf, and that for a part of said sum of

$180,000 the said company has issued a first lien upon the steel rails between Williamsville and Hunter, the junction of its road, and, further, that it owes on pay-rolls about $25,000 to its employees. Your petitioner further states that the said company is unable to pay its interest and has not paid the same for a number of years, and that various parties are now making claims against the said company on account of the said interest, amounting to about $250,000, all of which on said various bonds is unpaid.

Your petitioner further states that the said property is of great value, to wit, of the valuation of $1,500,000, and amply sufficient to pay all it owes if judicialy and carefully managed so as to preserve the same. Your petitioner further states that it is informed that certain parties with small claims to it unknown are now endeavoring to secure control of the said property by useless and expensive litigation and to so handle it as to be used to the detriment of its bondholders, stockholders, and creditors interested in the same and to the irremediable injury of all the said bondholders and other creditors.

Your petitioner further states that it has been informed that certain parties to it unknown now, without any immediate necessity, are about — institute suit on coupons due from your petitioner and otherwise to harm it, all of which will be a detriment and injury to the great many of its creditors.

Your petitioner further states that these suits instituted for the said purpose will very greatly damage the owners of all of the said bonds and impair the value of the said property, injure the stockholders, and otherwise create expense and detriment to the same and do great and irreparable harm to the creditors as a body.

Your petitioner further states that it is willing to pay its debts; that it has ample property to pay the same, and that if it has an opportunity to do so and the same property is handled under the order of the court, as directed by the court, that the same will ultimately pay all liabilities.

Your petitioner further states that the said *effect* to involve this property into litigation by parties to it unknown is made, as it verily believes, for the purpose of greatly injuring the same and destroying its value.

Wherefore your petitioner prays that your honorable court may appoint a receiver for the said railway, its equipment, and all property of whatsoever kind belonging to it, to manage the same for the benefit of all the creditors thereof represented by the trustees in said deeds of trust heretofore set out and hereto attached and made a part of this petition, and the trustees made defendants to this petition, and that all parties and individuals, their servants, agents, and attorneys, whatsoever they may be, be restrained and enjoined from in any way interfering with the management and control of the said property, and that the said railway, by its receiver appointed by your honorable court, *to* use, operate, and control the said property for the benefit of all said creditors, bondholders, and stockhold-

ers as aforesaid of said railroad company, and for such other and further relief as to your honorable court may seem mete and just.

ST. LOUIS, CAPE GIRARDEAU & FORT SMITH R'Y,
By LOUIS HOUCK, *President.*

Thereupon the said Ross, judge, made an order in writing appointing the said Louis Houck receiver of said railway, approved his bonds as such, and at half pass seven o'clock in the evening of the same day filed said petition, order, bond, and approval in the office of the clerk of said court of common pleas, and on the same day the said Louis Houck made and filed his oath of office as such receiver in the office of the clerk of said court, took possession of and since has been holding and managing said railway as receiver thereof under and by virtue of said appointment. On Monday, the sixth day of March, 1893, which was the day appointed by law for the opening of the March term of the Stoddard county circuit court, Judge Wear failing to appear to open and hold said court, the said George Houck was duly elected special judge of said court and entered upon the discharge of his duties as such. On the same day the answer of Leo Doyle, trustee, entering his appearance in the suit in the common pleas court and consenting to the appointment of Louis Houck as receiver, was filed in the office of the clerk of that court. On the 7th of March Klotz filed his oath of office and bond as receiver, which was approved by the clerk, and a notice issued from the office of the clerk of said court pursuant to the *other* aforesaid of Judge Wear, addressed to the defendants aforesaid in relator's said suit, and a summons in said suit returnable to the next term of said court, to be holden on the second Monday in September, 1893, was also issued and delivered to the sheriff on the same day, and the summons and notice of the rule to show cause on the same day a writ of injunction was issued by Judge Ross, of the common pleas court, directed to said Klitz, and a like writ to the relator, E. G. Merriam, prohibiting them from any way interfering with the said Houck as receiver of said road.

On the 8th day of March Edward Hidden, as trustee, filed his answer in the office of the clerk of the common pleas court, entering his appearance in the suit in that court and consenting to the appointment of Houck as receiver. On the same day another writ of injunction was issued by Judge Ross, directed to the attorneys of the relator, of like tenor of those theretofore issued against Klotz and Merriam, and on the same day all three of these injunctions writs were served upon the parties to whom directed, and on the same day Klotz appeared before Judge Ross, in chambers, and presented his petition, together with a certificate of his appointment by Judge Wear as receiver, praying for the cancellation of all orders made by him, the said Ross, as judge of the common pleas court in the proceedings aforesaid. Thereupon Judge Ross ordered the petition to be filed and continued until the next term of said court. On the 10th day of March the summons in the suit of relator in the Stoddard circuit court was duly served on Louis Houck and Leo Doyle.

Special Judge George Houck continued holding the March term of the Stoddard circuit court until the morning of the 13th of March, when the defendant railway company and Leo Doyle, each by their attorneys, appeared in said court and filed separate motions to vacate the provisional order theretofore made by Judge Wear appointing Klotz receiver as aforesaid in the said cause of the relator Merriam in said court. Said motions to vacate were immediately taken up, heard before said special judge, and sustained, and it was thereupon ordered and adjudged by said court "that said provisional order made on the 3rd of March, 1893, appointing Eli Klotz receiver of the St. Louis, Cape Girardeau & Fort Smith Railway Company be, and the same is hereby, vacated, set aside, and for naught held." Thereupon the railway company and Doyle, by leave of court, filed separate applications for a change of venue in said cause, which were continued until the next regular term for determination, and thereupon by a general order entered of record said circuit court was adjourned until court in course.

On the same morning and a short time after said court had been thus adjourned Judge Wear arrived at the county-seat, repaired to the court-house, opened court, and caused an order to be entered of record, after reciting his reasons therefor, "that all minutes heretofore made this day by said George Houck pretending *tending* to act as judge of this court be expunged and stricken from the records and all proceedings pretending to have been made in this court by said George Houck as pretended judge on this day be also stricken out and expunged from the record," and thereupon proceeded to consider the rule to show cause in the case of Merriam *vs.* The Railway Co. *et al.*, returnable that day, confirmed the appointment and qualification of Klotz as receiver, and overruled the application for change of venue for want of notice.

On the 16th of March Klotz made application to this court for a peremptory writ of mandamus, commanding the respondent to deliver to him as receiver as aforesaid the railway property, effects, and credits of the St. Louis, Cape Girardeau & Fort Smith railway aforesaid. An alternative writ, directed to the respondents to show cause why such writ should not be granted, was issued on the 25th of March, to which return was duly made, the issues heard and determined by this court in banc on the 27th of June, 1893, and the writ denied, the court holding in an opinion written by Gantt, J., 23 S. W. Rep., 196, that the provisional order of Judge Wear appointing the said Klotz receiver of said railway had been legally vacated by the circuit court of Stoddard county, presented over by Special Judge Houck, on the 13th of March, 1893, and that the subsequent action of Judge Wear on that day after the adjournment of said court by Judge Houck was void and of no effect. Consequently the said Klotz had no standing in this court for the relief prayed for.

Afterwards, on the 25th of July, 1893, there was filed in the office of the clerk of the circuit court of Stoddard county another order made by the Hon. John G. Wear, judge of the said court in vaca-

tion, appointing Klotz receiver of said railway, together with his oath of office and bond as such receiver approved by said judge.

In the meantime Louis Houck continued in the management and control of said railway under his appointment as receiver by Judge Ross, by whom many orders were made at his instance in relation thereto until the May term of said common pleas court. During said term and on the 22nd of May, 1893, the railway company filed an amended petition. On the 26th Leo Doyle, trustee, filed his answer thereto. On the 29th the appointment of Houck as receiver in vacation was confirmed. During the term many orders were made in respect of said property by said court, and answers were filed by Hidden, trustee, and the Mercantile Trust Company. On the 27th of July, 1893, the relator presented to the chief justice of this court and filed herein his suggestion for a writ of prohibition, directed to the said Alexander G. Ross, judge of the Cape Girardeau court of common pleas; the said railway company, Louis Houck, as president and as receiver thereof; Leo Doyle, the Mercantile Trust Company, and Edward Hidden, prohibiting them and each of them from further pursuing and holding cognizance of pleas in said cause in said court of common pleas. A rule upon said respondent was thereupon issued to show cause why such writ should not be issued, returnable to the October term of this court.

At the September term, 1893, of the Stoddard county circuit court, the railway company and Leo Doyle, trustee, filed their answers in the suit in that court, and by agreement the venue thereof was changed to the circuit court of Iron county.

From the foregoing summary, the condition of affairs when the respondents made return to the rule to show cause at this term of court will sufficiently appear, as well as the issues to be thereupon determined.

Is the power and control which the Cape Girardeau court of common pleas has assumed and is exercising over the corpus and affairs of the St. Louis, Cape Girardeau and Ft. Smith Railway Company, through a receiver appointed as aforesaid, authorized by law? and, if not, has the court power under the Constitution and laws to prohibit the further exercise of such control at the instance of relator? are the principal questions to be determined in this controversy.

The relator contends that the common pleas court never acquired jurisdiction to appoint a receiver of said railway company's property for two reasons: First, because there was not at the time the judge of said court assumed the authority to make such appointment nor since has been an action pending in said court in which a receiver could be appointed; and, second, because at the time said judge assumed authority to make such appointment a receiver had already been legally appointed in a cause pending in the circuit court of Stoddard county, a court of competent jurisdiction to make such appointment.

That the property of the railway company is partly within the jurisdiction of the Cape Girardeau court of common pleas, and that in a proper action pending in that court it had jurisdiction to appoint a receiver thereof is conceded. Was such an action pending

at the time Houck was appointed? A receiver is an indifferent person, appointed by the court to receive and protect the property or fund in litigation *pendenti lite*. The appointment is not the ultimate end and object of the suit, but is merely a provisional remedy or auxiliary proceeding. High on Receivers, sec. 1; 20 Am. Encyc. of Law, p. 17; C. R. S., 1889, sec. 2193.

No authority is given by the statutes of this State to its courts or to judges thereof in vacation to make such an appointment except in a pending suit, nor does it inhere in any of them under their general jurisdiction as courts of equity. To ascertain whether there was such a suit pending, it becomes necessary to look at the petition filed in the common pleas court, for there could not be a suit pending unless there was a suit commenced. In this State a suit is instituted "by filing in the office of the clerk of the proper court a petition setting forth the plaintiff's cause or causes of action and the remedy sought." R. S., 1889, sec. 531. When the petition is filed the suit is commenced. South Mo. Lumber Co. *v.* Wright, 114 Mo., 326.

The petition filed in the common pleas court is the petition of the railway company and sets forth in substance that it possesses certain property which is encumbered in different ways and to secure different amounts and owes defaulted interest and floating debt to a large amount and is insolvent; that certain small creditors are about to institute suit on interest coupons due from your petitioner for the purpose of injuring the same and doing great harm to creditors as a body, which will interfere with the operation of the road and impair the value of the security of the bondholders and other creditors; that the value of the property is such that if handled under the order of the court it will ultimately pay all liabilities. The court is thereupon asked to take possession of the railroad and its property through a receiver, to enjoin all persons from interfering with the same, and to use, operate, and control the property for the benefit of creditors, bondholders, and stockholders. Where in this paper called a petition is to be found a cause of action stated against anybody? What wrong is there complained of calling for the exercise of the remedial jurisdiction of a court of law or equity? What right of the petitioner or of anybody else, for that matter, is therein alleged to have been infringed or even threatened? None whatever. The whole scope of the paper is to inform the judge of the common pleas court in vacation that the railway company is in debt, in embarrassed circumstances, some of its creditors are about to sue upon its overdue obligations and to pray the court to take charge of its property and administer it for the benefit of all concerned. In other words, it is simply a petition by a debtor for the appointment of a receiver to manage and carry on its business so that its creditors cannot enforce their legal rights in the courts of the country and not a petition stating a cause of action, either at law or in equity, in which as incident thereto a receiver might be appointed. The filing of that petition no more instituted an actual controversy between contending suitors in court than would the filing of a copy of the Lord's Prayer. It laid

no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver unless some ground for the exercise of that jurisdiction can be found other than an actual pending controversy in the court which undertook its exercise. Counsel for respondents Houck and the railway company argue that the jurisdiction of the common pleas court to appoint a receiver on the facts presented in the petition can be maintained on the authority of Brassey *vs.* N. Y. & N. E. R. R. Co., 19 Fed. Rep., 663, and the Wabash cases, 22 Fed. Rep., 269, 23 Fed. Rep., 513 and 865, and 29 Fed. Rep., 618.

It must be conceded that the dicta of Judge Shipman in Brassy *v.* Railroad, *supra*, as quoted in the brief of counsel, would tend strongly to support their contention, providing, as it does, the impression that in that case the action was by an insolvent railroad company and the relief sought was the appointment of a receiver. This idea is, however, at once dispelled by a correct reading from the extract from the judge's opinion in connection with its context. That was an action by a bondholder against the railroad company. The learned judge, after reciting the contents of the bill, said:

"I am of the opinion that when a railroad corporation with its well-known obligations to the public has become entirely insolvent and unable to pay its secured debts, unable to pay its floating debt, and unable to pay the sums due its connecting lines, unable to borrow money, and in peril of the breaking up and distribution of its business, and confesses this inability, although no default has yet taken place upon the securities owned by the orator, but a default is imminent and manifest, a case has arisen when upon a bill for an injunction against attacks upon the mortgaged property and a receivership to protect the property of the corporation against peril a temporary receiver may be properly and wisely appointed.

"It is next said that this was a case of collusion between the orator and the railroad corporation. There is no claim there was any collusion on the part of the second-mortgage trustees. If by collusion it is meant that the preparation for and institution of the suit were known and desired by the directors or some of them in the belief that the granting of the prayer of the bill would be prudent and wise, then there was collusion. If by collusion it is meant that the institution of the suit or its management was marked by fraudulent design or purpose, there was not collusion. The complainant was the actual owner of five mortgage bonds. They were not placed in his hands, and were not transferred to him fictitiously, and were not brought by him for the purpose of this suit." The court refused to remove the receiver that had thus been appointed in a suit pending by a creditor against the debtor corporation, and gives no support to the proposition that the debtor can come into court by petition in the form of an action against its creditors and have a receiver appointed—a proposition that finds support in no adjudication in this country, so far as we are advised, except in the single instance of the Wabash receivership. In the several cases to which we have been cited growing out of that receivership the validity of the original appointment seems not to have been directly

raised or passed upon, but rather accepted as an accomplished fact. The original complaint does not appear. Its substance is, however, recited in 145 U. S., p. 84. In Central Trust Co. *v.* Wabash, 29 Fed. Rep., Treat, J., briefly states the nature and origin of the proceeding, as follows: "In order that this matter may not be misunderstood, for it is important in its vast-reaching consequences, it should be stated that it was not an application by a mortgagee to foreclose. It was an application by the corporation itself, concerning which a great deal of comment has been made elsewhere. The application was originally made to myself in this circuit, which is limited in extent. I hesitated. I found that Judge Shipman, a very learned and able judge, had gone over *in extenso* that class of thought. After further consideration with respect thereto I reached the conclusion that his views were correct, to wit: Here is a vast system, extending through many States and many judicial districts; a default it was certain would have been made in a few days. What should be done? The interests of all concerned required that some judicial action should be had for conservation of those interests, stockholders, bondholders, creditors at large, etc., and after patient thought I reached the conclusion that Brother Shipman was right. Since that time, fortunately, the Supeme Court of the United States has said that it was *is* right. Now, if any one in or out of judicial position chooses to dispute the action of this court that party may settle that controversy with the Supreme Court of the United States, which is authoritative so far as the action of this court is concerned."

However prudent and wise the action of Judge Treat, concurred in by Judge Brewer, may have been from a business standpoint in taking charge of this great railroad system, we have failed to discover that the Supreme Court of the United States has ever said judicially that upon such an application he had power to appoint a receiver to do so. In the only cases to which we have been cited by counsel in supporting this assertion—Quincy *v.* Humphreys, 145 U. S., 82, and St. Joseph *vs.* Humphreys, 145 U. S., 105—the question of the validity of the appointment of the receiver was neither raised nor passed upon by the Supreme Court. In one of the cases it was suggested that the bill was without precedent, but the court said, "We are not called upon to inquire as to how that may be," nor were they so called by the issues in the other case. The fact is the Wabash case is *sui generis*. There is no such source of equity jurisdiction as is supposed therein to have been discovered. It is without precedent, and we have found no published case that supports it. The single case cited by counsel of Presly *vs.* Lamb, 105 Ind., in which the appointment of a receiver in an action by one partner against another for settlement of a partnership affairs came collaterally before the court for consideration, manifestly does not support it. Cox *v.* Volhert, 86 Mo., 505. That a court of equity has no inhere-t power, except in some few cases of particular jurisdiction, to appoint a receiver except as an incident to and in a suit pending has hitherto, with the exception of the Wabash case, been a universally accepted doctrine, and outside of that case the doc-

trine that a court of equity without statutory authority has jurisdiction upon the application of an insolvent corporation to take charge and administer its affairs through a receiver not only has no support, but whenever suggested has been repudiated. The following are a few of the many authorities that might be cited in support of these positions: Jones *v.* Bank, 10 Col., 464; French Bank Case, 53 Cal., 495; Smith *v.* Superior Court, 32 Pac. Rep. (Cal.), 322; Hugh *v.* McRea *et al.*, Chase's Dec., 466; Port Huron *v.* Judge, 31 Mich., 456; Kimball *v.* Goodburn, 32 Mich., 11; Neal *v.* Hill, 16 Cal., 145; French *v.* Gifford, 30 Iowa, 160; Whitehead *v.* Wooten, 43 Miss.; Att'y Gen. *v.* Utica Ins. Co., 2 John, Ch., 370; *ex parte* Whitfield, 2nd Atkin, 315; Wait on Insolvent Corporations; sec. 183; Gluck & Becker, receivers, sec. 27.

There being no statutory authority in this State for the appointment of a receiver in such a proceeding, the appointment of Houck receiver by the common pleas court was a nullity, as appears from the foregoing authorities and what *we* has been said, and it follows as a consequence that his appointment is subject to collateral attack. Is the relator in a position to make the attack? By his petition, filed in the office of the clerk of the circuit court of Stoddard county on the 3rd of March, 1893, he became the plaintiff in a suit in that court as one of the creditors of the railway company in a mortgage security made by the company to trustees for the benefit of such creditors. He sued for himself and all those similarly situated; he sued to enforce a contract by which the company agreed that in case of default in the payment of interest the trustee might take possession of the mortgage property and apply the income to the payment of the interest and alleged the default. It was an equitable action *in rem*, of which the court had jurisdiction and in which a receiver might be appointed. R. S., 1889, sec. 2193; Gluck and Becker, receivers, sec. 15. It was a real controversy, of which the court had jurisdiction. The court in exercise of that jurisdiction took cognizance of the case and, having taking cognizance of the case, "is entitled to retain jurisdiction until the end of the litigation, and incidentally to take possession of the subject-matter of the controversy for the exclusion of all interference by other courts of concurrent jurisdiction." Gluc*h* & Becker, sec. 30. The subsequent proceedings in that court in that case are important only for the purpose of showing that the jurisdiction thus obtained has been retained, asserted, and maintained from the beginning. Whatever irregularities, if any, that may have occurred in the exercise of that jurisdiction can be corrected only in that court, and to insure such correction whatever questions may arise as to the manner of its exercise by that court may be determined here on appeal or writ of error, but cannot be the subject of the present inquiry, which goes no further than to the jurisdiction of those *to* courts. What we have to do with here is, on the other hand, a suitor in a court of competent jurisdiction seeking a legal remedy against the property of his debtor, and, on the other, the debtor having notice of that fact fleeing to the shelter of another court of concurrent jurisdiction and invoking its power

to defeat the exercise of jurisdiction by the former court and to deprive the suitor of the legal remedy to which he may be entitled. We have here no rase of diligence between two creditors seeking to subject their debtor's property to the payment of their demands in courts of concurrent jurisdiction, and between whom many of the interesting questions as to priority of right and jurisdiction between such courts, so learnedly discussed by counsel in their briefs, might have arisen. We have a debtor going through the mere form of bringing a suit against his creditors against whom he has no right of action, by presenting a paper in the form of a petition to the judge in vacation, in which the representative of the debtor and his creditors, the trustees in the securities, are named as defendants, against whom the debtor has no cause of action nor made a pretence of having, and praying the court to take possession of its property and administer its affairs upon the sole ground that it would be a good thing for the company and its creditors, some of whom are about to sue upon its obligations. It is folly to attempt to disguise the fact that this proceeding was taken before Judge Ross for the express purpose of defeating the legitimate exercise of the jurisdiction of the circuit court of Stoddard county in relator's suit in that court. That of some such purpose he was advised in the beginning appears upon the very face of the petition, and that after full knowledge that such was the object and effect thereof he has and does still assert and maintain his right and the jurisdiction of his court over the subject-matter of that suit, and the exercise of the jurisdiction of that court therein in his behalf, *and the exercise of the jurisdiction of that court therein in his behalf*, in a due and ordinary manner, is beyond question. The only excuse for so doing that can be found in this voluminous record is that the relator in bringing his suit was influenced by a malicious motive, which is alleged in the *ma*ended petition, and which is no excuse at all, for it goes without saying that "a malicious motive in asserting a legal right to do a particular thing will not give a right of action." 1 Am. & Eng. Encycl., 179.

The only precedent for the assertion or maint*ai*nance of the jurisdiction of the common pleas court is the case of the Wabash receivership, which is without precedent and ought to have no following. The exercise of such jurisdictton is not authorized by any statute of this State, and is not found within any source of equitable jurisdiction with which we are familiar or of which the books speak, and, being without warrant of law, it further exercise ought to be prohibited. By the constitution this court is invested with "a general superintending control over all inferior courts, with power to issue writs of *habeas corpus*, mandamus, *quo warranto*, certiorari, and other remedial writs, and to hear and determine the same." Const., art. VI, sec. 3. The writ of prohibition is a familiar mode of the exercise of this power, and is an appropriate one to restrain the exercise of jurisdiction by a *subordante* court over a subject-matter when it has none, and is loudly called for when such jurisdiction is asserted against a court that has jurisdiction and is asserting it, and when the officers of each acting under its orders are liable at any moment

to come into physical conflict over the possession of the subject-matter in controversy.

The writ of prohibition as prayed for should go. The ground upon which this conclusion has been reached obviate- the necessity of discussing the many questions raised and argued by counsel growing out of the action of the parties and the courts after these two proceedings were commenced, none of which go to the question of jurisdiction upon which this case turns.

It is therefore ordered that the writ of this court issue prohibiting the said respondent Ross, as judge of the common pleas court aforesaid, from entertaining any further pleas or taking any further judicial action in said so-called suit entitled The St. Louis, Cape Girardeau & Ft. Smith Railway Company against Leo Doyle, Ed. Hidden, and The Mercantile Trust Company of New York in said court of common pleas, and prohibiting the other respondents from further prosecuting any further pleas therein, and commanding the said Houck to turn over all the property of said railroad company that has come into his hands as *de facto* receiver thereof under the order of said common pleas court to the receiver *de jure* thereof who has been or may be appointed by the circuit court in which the suit aforesaid of relator is pending, and that he account therefor to such receiver under the supervision of said circuit court. Black, C. J., and Sherwood and MacFarlane, J. J., concurring; Barclay, Gantt, and Burgess, J. J., dissenting.

THEO. BRACE, *J.*

Supreme Court Rules.

Motion for rehearing.

Rule 20.—Motions for rehearing must be accompanied with a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case and duly submitted by counsel has been overlooked by the court or that the decision is in conflict with an express statute or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by the counsel and overlooked by the court or the statute in which the decision conflicts or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion or otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel.

(Record, page 554.)

And afterwards, to wit, on the 3rd day of April, 1894, the further following proceedings were had in said cause, to wit:

STATE *ex Rel.* E. G. MERRIAM *et al.*, *ex Rel.* ALEX. ROSS, Judge, etc., *et al.*, Resp.

Come now the said respondents, by attorney, and file their motion for a rehearing herein and therewith a motion to modify the judgment in this cause.

Which said motion for rehearing and to modify judgment is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1894.

STATE *ex Rel.* E. G. MERRIAM, Relator,
vs.
ALEXANDER ROSS, Judge, etc.; THE ST. LOUIS, CAPE GIRARDEAU & FT. SMITH R'Y CO. *et al.*, Respondents. } No. 6713.

Motion for Rehearing and to Modify Judgment.

Now come the respondents, Alexander Ross, judge of the Cape Girardeau court of common pleas; The St. Louis, Cape Girardeau & Ft. Smith R'y Company, Louis Houck, as president of said railway company, as well as receiver, and Leo Doyle, as trustee, and move this honorable court for a rehearing and reconsideration of said cause for the following reasons:

First. There is a question decisive of the cause and duly submitted by counsel that has been overlooked by the court, in that the court has not considered and disposed of the question of the effect on the jurisdiction of the court of common pleas of Cape Girardeau county of the counter-claim of Leo Doyle filed in said cause in the nature of a cross-bill.

Second. The court has overlooked the provision of sec. 8172 of the Revised Statutes of the State of Missouri and has disregarded said section.

Third. There was another question decisive of the cause duly submitted by counsel that has been overlooked by the court, namely, the question of the effect of the tender in the Iron county circuit court, as well as in the Stoddard circuit court and in the supreme court, of the amount due Merriam on his bonds, together with costs.

Fourth. There is another question decisive of the cause duly submitted by counsel and overlooked by the court, to wit, that the relator was not entitled to any relief is this court on his application for prohibition because he had not presented any objections in the court below to its jurisdictions and brought it to a determination.

Fifth. The decision is in conflict with a controlling decision to which the attention of the court was not called through the inadvertence of counsel, that decision being the State *ex Rel.* Klotz *vs.* Ross, judge, *et al.*, a decision of the supreme court of the State of Missouri, reported in the 23 Southwestern Reporter, p. 197.

These respondents particularly ask for a rehearing and annulment of that part of the order in this cause which reads as follows: "And commanding the said Houck to turn over all the property of

said railroad company that has come into his hands as *de facto* receiver thereof under the order of said common pleas court to the receiver *de jure* thereof, who has been or may be appointed by the circuit court in which this suit aforesaid of relator is pending, and that he account therefor to such receiver under the supervision of said circuit court," for the following reasons:

First. Said order is founded upon a proposition which has not been argued before the supreme court in this cause.

Second. It is against all authority.

Third. It is inconsistent with the opinion of the court which holds the appointment of Louis Houck void as receiver and yet assumes to command him as such officer to do certain acts and to account for his acts as an officer.

Fourth. The order and command is in violation of article 2, sec. 30, of the constitution of the State of Missouri, which provides that no property shall be taken without due process of law.

Fifth. That part of the order above quoted is in violation of article 5 of the amendments of the Constitution of the United States, which provides that no person shall "be deprived of life, liberty, or property without due process of law," and of the provisions of the first section of the fourteenth amendment of the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The order in reality is not prohibition but mandamus.

Seventh. It appears by the record in this cause that no receiver has been legally appointed or has qualified in the suit in which the relator herein is plaintiff.

Eighth. It affirmatively appears by the record in this cause that a suit is also pending in the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, wherein The Mercantile Trust Company is plaintiff and the respondent railway company and others are defendants, in which, among other things, a receiver is prayed for, and this court has no right, pending the controversy in the lower courts and in the United States circuit court, to determine in this proceeding questions that will necessarily arise in those cases in advance of their presentation to this court in due course of law.

(MEMORANDUM.—Here follow briefs of counsel upon the motion for rehearing.)

(Record, page 644½.)

STATE OF MISSOURI, *sct*:

The State of Missouri to Alexander Ross, judge of the Cape Girardeau court of common pleas; Louis Houck, president of the St. Louis, Cape Girardeau and Fort Smith Railway Company, as well as receiver thereof; the St. Louis, Cape Girardeau and Ft. Smith Railway Company, the Mercantile Trust Company, Leo Doyle, and Edward Hidden, Greeting:

Whereas it has been made to appear that you, the said Alexander Ross, judge of the Cape Girardeau court of common pleas, have been holding cognizance of pleas in a certain cause in the said Cape Girardeau court of common pleas wherein the said St. Louis, Cape Girardeau and Ft. Smith Railway Company is plaintiff and the said Mercantile Trust Company, Leo Doyle, and Edward Hidden are defendants, the same being a civil action for the purpose of appointing a receiver of all the assets of the said St. Louis, Cape Girardeau and Ft. Smith Railway Company, and that you, the said Louis Houck, president of the St. Louis, Cape Girardeau and Fort Smith Railway Company, as well as receiver thereof; the St. Louis, Cape Girardeau and Fort Smith Railway Company; the Merchantile Trust Company, Leo Doyle, and Edward Hidden, and each of you, are pursuing and holding cognizance of pleas in said cause in said court of common pleas:

Now, therefore, you, the said Alexander Ross, as judge of the said Cape Girardeau court of common pleas, are hereby commanded that, immediately upon receipt of this writ and without delay, — do cease from entertaining any further pleas or taking any further judicial action in said so-called suit entitled The St. Louis, Cape Girardeau and Fort Smith Railway Company against Leo Doyle, Edward Hidden, and The Mercantile Trust Company of New York, in said Cape Girardeau court of common pleas, and that you, the said St. Louis, Cape Girardeau and Fort Smith Railway Company; Louis Houck, as president of said railway company, as well as receiver thereof; the Mercantile Trust Company, Leo Doyle, and Edward Hidden, and each of you, are hereby commanded that, immediately upon receipt of this writ and without delay, you do cease from further prosecuting any further pleas therein.

And you, the said Louis Houck, are hereby commanded to turn over all the property of said railroad company that has come into your hands as *de facto* receiver thereof under the orders of the said Cape Girardeau court of common pleas to the receiver *de jure* thereof who has been or may be appointed by the circuit court of Stoddard county, in which the suit aforesaid of relator is pending, and that you account therefor to such receiver under the supervision of said circuit court of Stoddard county.

Witness my hand as clerk of the supreme court of the State of Missouri and the seal thereof hereto attached. Done at the city of Jefferson this 5th day of June, 1894.

[SEAL.] JNO. R. GREEN, *Clerk.*

Served this writ of prohibition by delivering a copy thereof to Alex. Ross, Leo Doyle, Louis Houck, and the St. Louis, Cape Girardeau and Ft. Smith Railway Company June 7, 1894, and by delivering a copy thereof to the attorney of the Mercantile Trust Company and on Edward Hidden June 8, 1894.

S. C. NOLAND,
Marshal of the Supreme Court of Missouri.

Fees.

6 writs	$6 00
Mileage, 631	31 55
	37 55

(MEMORANDUM.—Here is inserted order denying motion for rehearing petition for writ of error and the briefs thereon.)

(Record, page 673.)

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, The St. Louis, Cape Girardeau and Fort Smith Railway Company, as principal, and Louis Houck, Daniel S. Brown, Jas. F. Brooks, Leo Doyle, as sureties, are held and firmly bound unto the State of Missouri at the relation of Edwin G. Merriam, relator, in the full and just sum of twenty thousand ($20,000) dollars, to be paid to the said relator; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this seventh day of June, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at the April term, A. D. 1894, of the supreme court of the State of Missouri, in a suit in said court In the matter of the State of Missouri at the relation of Edwin G. Merriam, relator, against Alexander Ross, judge of the Cape Girardeau court of common pleas; The St. Louis, Cape Gir-rdeau and Fort Smith Railway Company, Louis Houck, president of said railway company, as well as pretended receiver of all the assets thereof under appointment of the said judge of said court of common pleas; Leo Doyle, The Mercantile Trust Company, a corporation, and Edward Hidden, respondents, judgment was rendered against the said St. Louis, Cape Girardeau and Fort Smith Railway Company, and the said company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said State of Missouri at the relation of Edwin G. Merriam, relator, citing and admonishing said relator to be and appear at a Supreme Court of the United States, to be held at Washington, D. C., within thirty days after the signing of said citation;

Now, the condition of the above obligation is such that if the said St. Louis, Cape Girardeau and Fort Smith Railway Company shall prosecute said writ to effect and answer all damages and costs if it

fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

ST. LOUIS, CAPE GIRARDEAU & FT. SMITH R'Y,
By LOUIS HOUCK, *President.* [SEAL.]
LOUIS HOUCK. [SEAL.]
D. S. BROWN. [SEAL.]
LEO DOYLE. [SEAL.]
JAMES N. BROOKS. [SEAL.]

Sealed and delivered in the presence of—
RUDOLPH BAHN.
E. F. BLOMEYER.

June 13th, 1894.
Approved by—
FRANCIS M. BLACK,
Chief Justice.

Daniel S. Brown, being duly sworn upon oath, states that he is worth above his liabilities and homestead exemptions at least fifty thousand (50,000) dollars; that he believes this to be a modest estimate of his financial resources; that he resides at Brownhurst, Spring Park, St. Louis county, Missouri.

D. S. BROWN.

Subscribed and sworn to before me this 7th day of June, 1894.
[SEAL.] RUDOLPH BAHN,
Notary Public.

Com. exp. Oct. 16, 1897.

Leo Doyle, being duly sworn, upon oath states that he is worth above his liabilities and homestead exemptions at least twenty thousand (20,000) dollars, and that two-thirds of the said estimated values of his property consists in real estate; that he believes the amount set fourth to be a fair and reasonable estimate of his financial resources.

LEO DOYLE.

Subscribed and sworn to before me this 7th day of June, 1894.
[SEAL.] RUDOLPH BAHN,
Notary Public.

Com. exp. Oct. 16, 1897.

James F. Brooks, being duly sworn, upon oath states that he is worth above his liabilities and homestead exemptions at least five thousand (5,000) dollars; that he believes this to be a modest estimate of his financial resources.

JAMES F. BROOKS.

Subscribed and sworn to before me this 7th day of June, 1894.
[SEAL.] RUDOLH BAHN,
Notary Public.

Com. exp. Oct. 16, 1897.

Louis Houck upon oath states that after paying all his debts and liabilities he verily believes that his remaining property will be worth more than twenty thousand (20,000) dollars, and, because he is engaged in a great many enterprises and a good deal of business, makes this specific statement:

First. That he owns some six thousand (6,000) acres of land incumbered by mortgage worth thirty thousand (30,000) dollars; that said real estate is situated in the counties of Cape Girardeau, Stoddard, New Madrid, Scott, Bollinger, and Mississippi, and that in this estimate of the value of his real estate is not embraced a great number of lots in a number of small towns and villages situated on the line of the St. Louis, Cape Girardeau & Ft. Smith railway; that, in addition, he owns the controlling stock in the St. Louis, Kennett & Southern railroad, and at a fair valuation of the value of said controlling interest would be twenty-five thousand (25,000) dollars; and, further, that, in addition, he also owns the controlling stock and bonds, the controlling stock being one hundred and ten thousand (110,000) dollars and sixty thousand (60,000) dollars of the first-mortgage bonds, of Houck's Missouri & Arkansas railroad, worth thirty thousand (30,000) dollars, and that in his judgment the said estimate is very low; that, in addition, he owns other personal property worth at least five thousand (5,000) dollars, and that all his personal liabilities will not reach the sum of twelve thousand (12,000) dollars; that, however, he has contingent liabilities as endorser of the St. Louis, Cape Girardeau & Ft. Smith Railway Company secured by collaterals, and if the said collateral securities should turn out to be worth only half of what he supposes the same to be worth and that the same will bring that the value of his estate will be a great deal more than twenty thousand (20,000) dollars; that in the estimate he makes of his property and effects he does not include the one million (1,000,000) dollars of the capital stock of the St. Louis, Cape Girardeau & Ft. Smith railway, amounting to nine-tenths of the whole issue, because he cannot say at this time whether the said stock will be valuable or worthless; nor does he include in the said estimate forty-one thousand (41,000) acres of land owned by him in the county of Pemiscot, because of certain contracts with reference to said land for the construction of a railroad between Caruthersville and Kennett; that in making the above estimate of his assets he verily believes that he has stated the same to be under their real value, but has endeavored to make a fair statement of his financial condition.

LOUIS HOUCK.

Subscribed and sworn to before me this 8th day of June, 1894.

[SEAL.] RUDOLPH BAHN,
Notary Public.

Com. exp. Oct. 16, 1897.

(MEMORANDUM.—Here is inserted another copy of the assignment of errors.)

Supreme Court of the United States.

OCTOBER TERM, 1894, NO. 751.

THE ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM.

Motion to Dismiss or Affirm.

Now come the counsel for defendant in error in the above-entitled cause, and move this Court to dismiss the writ of error herein on the ground that this Court had no jurisdiction of this case; or to affirm the judgment of the Supreme Court of the State of Missouri herein on the ground that, although the record may show that this Court has jurisdiction, the question on which the jurisdiction depends is so frivolous as not to need further argument.

(Signed) JOHN F. DILLON,
WINSLOW S. PIERCE,
Counsel for Defendant in Error.

Statement of the Case.

This action was begun in the Supreme Court of the State of Missouri on the 20th day of July, 1893, by the filing in said Court of a Petition for a Writ of Prohibition, said Petition being filed by Edwin G. Merriam, the Relator herein *(Record, p. 5)*. In said Petition the Relator set forth that the St. Louis, Cape Girardeau and Fort Smith Railway Company was a railway corporation organized under the laws of Missouri; that it had made, on September 1, 1880, a certain mortgage, covering part of its road, to Leo Doyle, as trustee, to secure an issue of bonds amounting to $100,000; that on July 18, 1881, the same company had made to said Leo Doyle, as trustee, its mortgage on another part of its road to secure an issue of $170,000 of its bonds; and also had made certain other mortgages, as set forth in the Petition. The Petition also alleged that the Relator was the holder of $27,000 of the bonds secured by said mortgage of September 1, 1880, and $49,200 of the bonds secured by said mortgage of July 18, 1881.

The Petition further stated that default had been made in the payment of the interest on said bonds held by the Relator, and that after such default he, on the 3d day of March, 1893, filed in the Circuit Court of Stoddard County a Bill of Complaint in behalf of himself and all others similarly situated, against the said Railway Company, said Leo Doyle, and certain junior incumbrancers. A copy of this Bill of Complaint is set forth in this record at page 6. The said bill *(Record, p. 11)* prayed for the appointment of a Receiver of said railroad, and for foreclosure and other relief.

The Petition *(Record*, p. 12*)* then sets forth that on the presentation of said bill of foreclosure on the 3d day of March, 1893, the Circuit Court of Stoddard County, Missouri, appointed as Receiver under said bill Eli Klotz, and authorized him to take possession of the property of the Railway Company and manage and operate the same.

The Petition then sets forth that on the 4th day of March, 1893, a pretended suit was instituted in the name of the said St. Louis, Cape Girardeau and Fort Smith Railway Company in another court, the Cape Girardeau Court of Common Pleas, and that such Court appointed Louis Houck, the president and general manager of said Railway Company and the owner of a large majority of its stock, Receiver of the said Company's property, and that the said Louis Houck, at the time of the filing of said Petition in the Missouri Supreme Court, held the said road as such Receiver. A copy of the bill of said Railway Company filed in the Cape Girardeau Court of Common Pleas is set forth in this record at page 13.

The Petition then sets forth (Record, p. 15) that in the said suit so instituted in the Circuit Court of Stoddard County process was duly issued and was duly served upon the defendant Railway Company on the 8th day of March, 1893, and upon the defendant Leo Doyle on or about the 9th day of March, 1893.

The Petition then sets forth (Record, p. 16) certain proceedings in the said Stoddard County Circuit Court in which GEORGE HOUCK (a brother of Louis Houck, president of the defendant Railway Company) was, on March 6, 1893, temporarily appointed Judge in place of JOHN G. WEAR, who was prevented by sickness from attending court, and that said GEO. HOUCK, as such

Judge, made an order early on March 13, 1893, discharging said Eli Klotz as Receiver; and that afterward, on the same 13th day of March, the said JOHN G. WEAR reconvened said Court and reappointed and confirmed the said Klotz as such Receiver; and that later, on the 24th day of July, 1893, the said Judge WEAR again reappointed and confirmed the said Eli Klotz as Receiver.

The Petition sets forth (Record, p. 17) that the said Leo. Doyle, in contravention of his duties as trustee under the mortgages securing the bonds of the Relator, acted with the said Louis Houck and the said Railway Company, and is represented in the said suits by counsel employed at the suggestion and instance of said Houck.

The Petition then avers (Record, p. 17) that the Cape Girardeau Court of Common Pleas was, at the time of the filing of said petition, threatening and about to issue Receivers' certificates to the amount of $250,000, and to make them a lien on the property of the company prior to the lien of the mortgages securing the bonds held by the Relator.

The Petition asked as relief (*Record*, p. 18) that a writ of prohibition issue, directed to ALEXANDER ROSS, Judge of the said Cape Girardeau Court of Common Pleas, and the other respondents, prohibiting him and them from pursuing and holding the pleas aforesaid, and taking any further cognizance of the said suit before them touching the premises, and directing said Court of Common Pleas to surrender to the proper jurisdiction of the Circuit Court of Stoddard County the said property of the said Railway Company.

ANSWERS TO PETITION.—The said ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas, filed his answer to the petition (*Record*, p. 19); the Railway Company also filed its answer or return (*Record*, p. 22); as also did Louis Houck (*Record*, p. 33), Edward Hidden (*Record*, p. 38), and the Mercantile Trust Company (*Record*, p. 41).

The Relator filed an answer and exceptions to the return of Louis Houck (*Record*, p. 43), and the Court, after considering the same, made an order striking out certain parts of the returns and answers (*Record*, pp. 44-49).

Said Leo Doyle filed his answer to the rule to show cause why prohibition should not issue (*Record*, p. 49), in which he set forth, among other things, the filing by him on May 22, 1893, of a cross-bill in the said suit in the Cape Girardeau Court of Common Pleas, copy of which appears in this Record (pp. 50–54).

STIPULATION OF FACTS.—After the filing of the Petition for the Writ of Prohibition in the Supreme Court of Missouri, the parties stipulated in this case in that Court that certain facts might be considered as proved, and so treated by the Court (*Record*, p. 55).

JUDGMENT GRANTING WRIT OF PROHIBITION.—On December 4th, 1893, the Court, after hearing the parties and after argument rendered its judgment granting the Writ of Prohibition (*Record*, p. 57), and a Writ was afterwards issued accordingly (*Record*, p. 73), commanding the Cape Girardeau Court of Common Pleas to cease from entertaining any further pleas or taking

any further action in said so-called suit, entitled the "St. Louis, Cape Girardeau & Ft. Smith Railway Company against Leo Doyle and others" in said Court, and that the said Railway Company and the said Houck, as president thereof, as well as Receiver thereof, and the other respondents, cease from further prosecuting any further pleas therein. Said writ also directed the said Louis Houck to turn over all the property of said Railway Company that had come into his hands as Receiver *de facto* thereof, under the orders of the said Cape Girardeau Court of Common Pleas, to the Receiver *de jure* thereof, who had been or might be appointed by the Circuit Court of Stoddard County, in which the suit aforesaid of the Relator was pending, and that he account therefor as such Receiver, under the supervision of the said Circuit Court of Stoddard County.

MOTION FOR REHEARING.—The respondents made a motion in the Supreme Court of Missouri for a rehearing and a modification of the judgment (*Record*, p. 71); and they set forth, among other things, in their petition for rehearing (*Record*, p. 72) that part of the Writ of Prohibition which commanded the said Houck to turn over the property of said Railway Company which had come into his hands as Receiver *de facto* under the orders of the Common Pleas Court to the Receiver *de jure* who had been or should be appointed by the Circuit Court and account therefor to such Receivers under the supervision of the Circuit Court; and afterwards aver as follows (*Record*, p. 72):

"FIFTH. That part of the order above quoted is in violation of Article 5 of the Amendments of the Constitution of the United States, which provides that no person shall 'be deprived of life, liberty or property without due process of law,' and of the provisions of

the first section of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The motion for rehearing was denied *(Record*, p. 74*)*.

THE OPINION OF THE COURT—The Supreme Court of Missouri, in its opinion *(Record*, pp. 58-70*)*, held that, under the common law and the statutes of the State of Missouri, the Cape Girardeau Court of Common Pleas had no jurisdiction of such proceedings as the alleged suit brought by the Railway Company, inasmuch as such alleged suit was in reality only an attempt by the debtor Railway Company, and those who held the stock thereof and controlled the same, to prevent the property of the Railway Company from being subjected to the regular equity foreclosure suit instituted in the Stoddard County Circuit Court by the Relator, Edwin C. Merriam. The Supreme Court of Missouri therefore held that, as there was in reality no equity suit pending in the Cape Girardeau Court of Common Pleas, that court had no jurisdiction or power to appoint a Receiver of the property of the Railway Company or otherwise to proceed with the suit.

From these facts above stated it will be seen that the judgment of the Supreme Court of Missouri, in granting a writ of prohibition, in effect decided that all of the proceedings in relation to the foreclosure of mortgages securing the bonds held by the Relator Merriam, and in regard to the property of the Railway Company, should be prosecuted in the Stoddard County

Circuit Court. This judgment did not finally decide on the merits of any matter in issue, but merely decided as to which tribunal under the statutes of Missouri and the common law was the proper tribunal for the hearing and judicial determination of the matters in litigation between the parties.

We proceed to show that this Court has no jurisdiction of the writ of error to the Missouri Supreme Court in this case; or that, if it has any jurisdiction, the question on which jurisdiction depends is so frivolous as not to need further argument.

ARGUMENT.

I.

No Federal Question was raised in the Supreme Court of Missouri, and, therefore, this Court has no jurisdiction to review the judgment of that Court.

Section 709 of the Revised Statutes, under which alone this Court can review a judgment of a State Court, provides for such review only when there is "*drawn in question*" the validity of a statute, &c., * * * and the decision is against the title, right, privilege or immunity "*specially set up or claimed*," &c. In other words, Section 709 does not provide for the review of a decision of any State Court unless a federal question is distinctly *raised* in that Court. To this effect are repeated decisions of this Court:

Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S., 57.

Simmerman vs. State of Nebraska, 116 U. S., 54.
Otis vs. Morgan Steamship Co., 116 U. S., 548.
Loeber vs. Schroeder, 149 U. S., 580, 585.
Morrison vs. Watson, 154 U. S., 111, 115.
Chappell vs. Bradshaw, 128 U. S., 132.
Bushnell vs. Crooke Mining Co., 148 U. S., 689.

In the present case the Court will look in vain to find any real federal question raised on the record in the Supreme Court of Missouri. None of the pleadings in that Court nor the agreed statement of facts raised any such question.

We have not overlooked the fact that the Railway Company, in its answer or return to the petition for writ of prohibition in the Missouri Supreme Court, avers *(Record*, p. 32*)*

"that any action by said Judge of the Circuit Court of Stoddard County or by said Court itself attempting to seize out of the possession of this respondent under either of said divisional mortgages all of said railroad or any other part thereof than that expressly named in said divisional mortgages was, and is and must be against the contract expressed in said last-named mortgages, and against the express provisions of both the Constitution of Missouri and the Constitution of the United States, providing that no person shall be deprived of property without due process of law, and is against the express law of the land;"

or that the said Louis Houck, in his answer or return to said petition for writ of prohibition in the Supreme Court of Missouri, avers *(Record*, p. 38*)*

"that the relator has no lien upon any part of the railroad beyond or west of Lakeville, and avers that his

efforts to cause and compel this Court or the Circuit Court of Stoddard County to take possession of any part of it beyond Lakeville is in violation of the Constitution of this State and of the United States, and of the law of the land, all of which guarantees that no property shall be taken except by due process of law."

So far as concerns the return of Louis Houck, we submit that his answer is immaterial, since he does not appear as a plaintiff in error in this Court.

So far as that part of the answer of the Railway Company above quoted is concerned, which avers that any action of the Judge of the Circuit Court of Stoddard County will be against the provisions of the Constitution of the United States, such part of its answer or return was stricken out by the Court (*Record*, pp. 44–49), and no objection was made or exception was taken, so far as is shown in the record. This part of the answer of the Railway Company, therefore, does not raise any Federal question on the record.

Furthermore, this answer of the Railway Company does not really raise any Federal question. There is no color of ground for the averment that the action of the Judge of the Circuit Court of Stoddard County, in appointing a Receiver of the entire property of the Railway Company, an insolvent debtor (whether such property is wholly covered by a mortgage or not), is contrary to the Constitution of the United States in that it deprives such debtor of his property without due process of law, or is against the law of the land. Any such action of the Judge of the Circuit Court of Stoddard County merely puts the property of the insolvent debtor *in custodiam legis*, to be administered *according to due process of law* in the ordinary course of judicial proceedings. For this reason, there-

fore, that part of the answer of the Railway Company to the writ of prohibition in the Supreme Court does not raise any Federal question. There was not even color of ground for averring the existence of any Federal question. The authorities are clear that in such case the writ of error must be dismissed.

In the case of *New Orleans vs. New Orleans Waterworks Co.*, 142 U. S., 79, the opinion of this Court, at page 84, states that the City of New Orleans filed an amended answer in that case in which it alleged

"that the guarantee of this law to the city, securing to it the benefits of free water, has not been and cannot be diminished without impairing the obligations of contracts, and thereby violating Article 1, Section 10, of the Constitution of the United States."

This Court, however, decided that no Federal question was thereby raised, and granted the motion to dismiss the writ of error. In giving its opinion, this Court said (p. 87):

"While there is in the amended and supplemental answer of the city a formal averment that the Ordinance No. 909 impaired the obligation of a contract arising out of the Act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay."

This opinion was quoted with approval by this Court in the recent case of *Hamblin vs. The Western Land Co.*, 147 U. S., 531, 532.

As no Federal question was raised *on the record*, it is not necessary or proper for this Court to go outside of the record and look into the opinion to see whether or not any Federal question was in fact *decided*. The obvious reason is that as the record raised no Federal question, a decision of any alleged Federal question is not necessary to sustain the judgment; and, therefore even if the State Court had gone out of its way and decided a Federal question, this Court, under the well-known rule laid down in *Murdock vs. Memphis*, 20 Wall, 590, would not assume jurisdiction for the purpose of correcting any decision made by the State Court on a Federal question. The decisions of this Court are uniform in support of the proposition above stated.

In *Otis vs. Morgan Steamship Co.*, 116 U. S., 548, the Court dismissed a writ of error to the Court of Appeals of New York, stating at page 550:

> "There is not in the record the least suggestion of a Federal question. We will not look into the opinion, therefore, which has been annexed to the record below in obedience to our Rule No. 8, Section 2, to ascertain whether such a question was in fact decided."

It is true that since the amendment in 1867 to Section 25 of the Judiciary Act, now Section 709 of the Revised Statutes, this Court, *if it is of the opinion that a Federal question was properly raised on the record*, may go outside of the record and look into the opinion of the Court below for the purpose of ascertaining the grounds of the decision of that Court. But it will not do so unless the Federal question was properly raised on the record.

In the present case the only suggestions of a federal question which are to be found in the transcript from

the State Court, are the extract quoted in this brief in the statement of case (Record, pp. 71–72); and the above quoted parts of the answers or returns of the Railway Company (Record, p. 32) and Louis Houck (Record, p. 38).

The suggestion, made in the Motion for Rehearing before the Missouri Supreme Court is, that its judgment is in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. This Motion for a Rehearing was made April 3d, 1894 (*Record*, p. 70), several days after the final judgment in this case, which was rendered March 24th, 1893 (*Record*, p. 57).

This Petition and Motion for Rehearing constitutes no part of the record on which the judgment rests and cannot be referred to to show that a federal question was raised on the record in the State Court. This precise point has been several times decided by this Court. In *Susquehanna Boom Co. vs. West. Branch Boom Co.*, 110 U. S., 57, this Court says, dismissing a writ of error to the Supreme Court of the State of Pennsylvania (p. 59):

"The fact that on a Petition for rehearing it was suggested that if the charter of the Western Branch Company was so construed as to give it the right to maintain its sheer boom in the north half of the stream, that charter would impair the obligation of the contract of the State with the Susquehanna Company, is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the Court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a Petition for rehearing. Such a Petition is no part of the record on which the judgment rests."

Similar decisions were made in: *Simmerman vs. Nebraska*, 116 U. S., 54; *Chappell vs. Bradshaw*, 128 U. S., 132; *Bushnell vs. Crooke Mining Co.*, 148 U. S., 682, 689; and *Loeber vs. Schroeder*, 149 U. S., 580, 585.

So, also, in *Morrison vs. Watson*, 154 U. S., 111, this Court, dismissing a writ of error to the Supreme Court of the State of North Carolina, says (p. 115):

"In order to give this Court jurisdiction of a writ of error to review a judgment of the highest court of a State on the ground that it decided against a title, right, privilege or immunity, claimed under the Constution or a treaty or statute of the United States, such title, right, privilege or immunity must have been specially set up or claimed, at the proper time and in the proper way." * * * "if it was not claimed in any form before judgment in the highest Court of the State, it cannot be asserted in this Court."

For these reasons, therefore, this Court should dismiss the writ of error for want of jurisdiction on the ground that no Federal question was raised in the Court below.

II.

We now proceed to show that even if any pretended Federal question was raised or called to the attention of the State Court, yet there was really no Federal question involved, and that for this reason, also, the

writ of error should be dismissed for want of jurisdiction.

The questions involved in this case in the Supreme Court of Missouri on the petition for a writ of prohibition, and in the judgment granting the said writ, were all of them questions either of the construction and application of *State statutes, or questions of general equity jurisprudence and procedure.* It is well settled that such questions are not Federal questions and cannot be made the basis of a writ of error to bring a judgment of a State Court for review before this Court. The decisions of this Court are unanimous to this effect. The precise question involved in the Supreme Court of Missouri on the petition for writ of prohibition was whether the Cape Girardeau Court of Common Pleas had jurisdiction of the pretended suit therein pending, and the Supreme Court of Missouri decided that it had not, and therefore issued its writ of prohibition to that Court. This question is clearly not a Federal question. The extent of the jurisdiction of the Cape Girardeau Court of Common Pleas depends either upon the Constitution and statutes of the State of Missouri, or upon the general laws of equity jurisprudence and procedure.

This Court expressly decided in the case of *Smith vs. Adsit*, 16 Wall., 185, on writ of error to the Supreme Court of the State of Illinois, that the extent of the equitable jurisdiction of a State Court in that case did not constitute a Federal question. This Court dismissed the writ of error, and in giving its opinion (p. 189) says:

"As we have seen, the bill was dismissed for want of jurisdiction. The judgment of the Court respecting the extent of its equitable jurisdiction is, of course, not reviewable here."

The same principle was involved in the decision of the case *In re Graham*, 138 U. S., 461, in which the Court held (p. 464) that

"when the highest Court of a State holds that a judgment of one of its inferior Courts imposing punishment in a criminal case is binding and valid to the extent in which the law of the State authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principal of Federal law invaded in such ruling."

This Court has no jurisdiction to review the judgment of the Missouri Supreme Court in this case, whether that judgment be regarded as resting on the principles of general law (*Northern Pacific Railroad Co. vs. Ellis*, 144 U. S., 458), or whether it be regarded as resting on the construction of the Constitution and statutes of the State of Missouri (*Sage vs. Louisiana Board of Liquidation*, 144 U. S., 647), or whether that judgment rests partly on the principles of general law and partly on the construction of the Missouri Constitution and statutes.

So, also, this Court has decided that the extent of jurisdiction of a tax assessor is not a Federal question.

Tyler vs. Cass County, 142 U. S., 288.

If the decision of the Missouri Supreme Court be regarded as a decision as to proper *procedure* in the State Courts, this Court will not take jurisdiction on writ of error to correct its judgment. Mere matters of procedure in state courts do not ordinarily involve Federal questions.

Tripp vs. Santa Rosa Street Ry. Co., 144 U. S., 126.

If the decision of the Missouri Supreme Court be regarded as depending in any respect upon the question

as to what constitutes the *commencement of an action* in one of the inferior state courts (the suit of relator in the Stoddard County Circuit Court having been begun March 3, 1893, and the suit of the Railway Company in the Cape Girardeau County Court of Common Pleas having been begun March 4, 1893)—this does not constitute a Federal question.

Richmond Mining Co. vs. Rose, 114 U. S., 576.

The true nature and effect of the decision of the Missouri Supreme Court was, not to deprive the plaintiff in error of any property without due process of law, or to deny it any right, title or immunity, claimed or alleged to be claimed, under the Constitution and laws of the United States; but this judgment of the Missouri Supreme Court merely remanded all of the parties to the litigation to the Circuit Court of Stoddard County. If in that Court any party shall be denied any right under the Constitution or laws of the United States, there will then be ample time and opportunity for such party to take a writ of error to this Court.

It is well settled that a State Court does not decide a federal question in deciding that under State procedure a person must pursue his rights in one State tribunal rather than in another, so long as in the tribunal to which he is remitted he has opportunity to be heard and to protect his rights. In the case of *Haley vs. Breeze*, 144 U. S., 130, on a writ of error to the Supreme Court of Colorado, plaintiff in error had filed a bill in an equity court in the State to enjoin the collection of certain taxes. The State statutes having provided an opportunity for him to appear before the

Board of Equalization to apply for the correction of errors, and he having neglected to apply to that tribunal, the equity court dismissed his bill. This Court, on the writ of error, decided that the record presented no federal question, and, therefore, dismissed the writ of error.

A similar decision was made in the case of *Northern Pacific Railroad Company vs. Patterson*, 154 U. S., 130, on writ of error to the Supreme Court of Montana. In that case the laws of the State had created a tribunal for the correction of assessments and provided that persons aggrieved might apply to such tribunal for their correction. The Supreme Court of that State determined that the statute remedy was exclusive and on writ of error this Court held that such decision of the Supreme Court of Montana did not raise any Federal question.

So, also, in the case of *Loeber vs. Schroeder*, 149 U. S., 580, this Court says (p. 585):

"The said statute relates to a matter of State practice alone, and the proper construction of that statute, upon well-settled principles, rested with the State courts. The question as to whether the plaintiff's remedy was at law or in equity was a matter dependent entirely upon local law and involved no Federal right whatever."

So, also, in the case of *Yesler vs. Washington Harbor Line Commissioners*, 146 U. S., 646, this Court ecided that a judgment of a State Court of Washington denying a writ of prohibition on the ground that, under the State laws the petitioner had other remedies, was not a decision of a Federal question.

For the same reason the judgment of the Missouri Supreme Court in the present case, granting the writ of prohibition on the ground that under the State laws

it is proper to prohibit one court from acting but leaving open to the respondents another court for the judicial hearing and determination of the matters in controversy, is not a decision of a federal question.

IN SHORT, this case in the Supreme Court of Missouri was as follows: Two inferior courts of that State were both assuming to act and exercise jurisdiction in the same matter to the manifest detriment of the parties, and contrary to the orderly and settled principles of legal procedure. Under these circumstances, one of the parties applied to the Supreme Court of Missouri to interfere and prevent this unseemly conflict between the two inferior courts. The Supreme Court did interfere, and granted its writ of prohibition against one of those courts, to wit, the Court of Common Pleas of Cape Girardeau County, to prohibit it and the parties from proceeding further in that Court; and held that the Stoddard County Circuit Court, which acquired jurisdiction of the cause first in point of time, was the proper forum in which the litigation should proceed. This decision was based on the Constitution and laws of the State of Missouri, and the general law of equity jurisprudence and procedure. No Federal question was involved in the decision.

For these reasons, therefore, the writ of error should be dismissed on the ground that no federal question was involved in the case.

III.

If, however, this Court should hold that it has jurisdiction of this case, then the judgment of the Supreme Court should be affirmed, on the ground that the question on which the jurisdiction depends is so frivolous as not to need further argument.

If this Court be of the opinion that a federal question was raised in the Missouri Supreme Court and decided by that Court, then, inasmuch as it appears that the question was rightly decided, the judgment of that Court should be affirmed. There cannot be any pretense that the plaintiff in error was, by the judgment of the State Court, deprived of his life, liberty or property without due process of law, or denied the equal protection of the laws.

So far as concerns that part of the writ which directs the Receiver in the Common Pleas case to turn over all the property of the Railway Company to a Receiver who had been or might be appointed by the Circuit Court of Stoddard County and account for the same, that order is merely directing an officer of one Court to turn over property to an officer of another Court. In both cases the custody of the property is in the Court, and the Receiver of the Common Pleas Court had, as such Receiver and by virtue of such custody no personal right or interest whatever in the property. The order, in this respect, merely acted on him as an officer of the Court. It cannot for a moment be contended that either he or the plaintiff in error, by this order, was deprived of his or its property without due process of law, or deprived of any other right guaranteed to him or it by the Constitution or laws of the United States.

It is, moreover, a complete answer to any suggestion of a taking of property without due process of law, or denying plaintiff the equal protection of the laws, or any other right guaranteed by the Constitution or laws of the United States, that by the judgment of the Missouri Supreme Court and under the laws of that State, the plaintiff in error has an ample opportunity to appear and have all the matters litigated in the Circuit Court of Stoddard County, a duly constituted judicial tribunal having jurisdiction for that purpose. Nowhere in the record does it appear that any claim or suggestion was made that the plaintiff in error was denied any right which it could claim under the constitution and laws of the United States. The plaintiff in error, as well as the other respondents, had due notice of the proceedings on the Petition for prohibition and appeared and answered the same. The plaintiff in error was also duly served with process in the suit in the Circuit Court of Stoddard County *(Record*, p. 15*)*.

We have already considered under Point I., *supra*, those parts of the answers of the Railway Company and of Louis Houck to the petition for writ of prohibition in the Supreme Court of Missouri which aver that any action of the Judge of the Circuit Court of Stoddard County, in taking possession, by a Receiver, of property of the Railway Company will be contrary to the provisions of the Fifth or Fourteenth Amendments to the Constitution of the United States ; and have shown that such parts of those answers really raise no Federal question, and, therefore, the writ of error should be dismissed on the ground that this Court has no jurisdiction. We now submit under this Point III. that, even if this Court has jurisdiction of this case by reason of

the averments made in those parts of the answers of the Railway Company and Louis Houck above referred to, then the judgment of the Supreme Court of Missouri should be affirmed, on the ground that the question on which the jurisdiction of this Court depends is so frivolous as not to need further argument. To sustain this proposition we refer to our brief, *supra*, Point I., where such parts of the answers of the Railway Company and Louis Houck are quoted and discussed at length, and submit that, if any Federal question was thereby raised, the decision of the Court below is so clearly right as not to need any further argument.

For these reasons, even if this Court shall hold that it has jurisdiction on the ground that a Federal question has been raised and been decided by the State Court, still this Court should affirm the judgment on the ground that the question on which the jurisdiction depends was decided rightly by that Court and is so frivolous as not to need further argument.

IV.

For these reasons this writ of error should be dismissed or the judgment affirmed with costs.

JOHN F. DILLON,
WINSLOW S. PIERCE,
HARRY HUBBARD,
For the Defendant in Error.

156-478

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 751.

THE ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY,

Plaintiff in Error.

vs.

THE STATE OF MISSOURI AT THE RELATION OF EDWIN G. MERRIAM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Brief for Plaintiff in Error Against Motion to Dismiss or Affirm.

JOHN W. NOBLE,
MADISON R. SMITH,
Counsel for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1894, NO. 751.

THE ST. LOUIS, CAPE GIRARDEAU AND FORT SMITH RAILWAY COMPANY,
Plaintiff in Error,
vs.
THE STATE OF MISSOURI at the Relation of EDWIN G. MERRIAM.

Statement, Brief and Argument by Plaintiff in Error in Opposition to Motion.

Statement.

The statement made by the defendant in error is intended to develop only one of the two points relied on by the plaintiff in error; the other being almost ignored both in the statement and argument.

That statement, and the argument based on it, is made for the purpose of showing that the Federal question, which was distinctly raised in the answer of the respondent Railway Company (here plaintiff in error) to the petition for a writ of prohibition, was stricken out by the State Supreme Court, (the proceeding being one of original jurisdiction in that court), and that because no exception to this was at the time preserved, therefore it cannot be considered here; or if it is considered, it is but a frivolous question, and the judgment below should be affirmed.

It will be observed that defendant in error in his statement mistakenly speaks of the suit instituted in the Circuit Court of Stoddard County by relator Merriam, complainant therein, as being for the purpose of foreclosing his mortgages. Such, however, is not the case, as the record clearly shows. See the prayer in complainant's bill (Extract, p. 11). It was a suit to sequester by a Receiver through the intervention of a court of equity a railroad of almost 100 miles in length, worth a million and a half of dollars or more, to satisfy an interest debt of not more than $8000.00. A suit by sequestration is not authorized by any statute or proceeding in equity in the State of Missouri.

We shall present our reasons and authorities in reply to the propositions advanced and argued by the defendant in error, in the after part of this, our reply: but will first proceed to present that part of the case omitted by him.

The State court's action we assert was in violation of the Fourteenth amendment of the constitution of the United States, in that by the judgment of that court, the plaintiff in error, the railway company, was deprived of its entire railway and property without due process of law, and also denied the equal protection of the laws within the jurisdiction of the state, through its order that the railway and its appurtenances should be turned over to a third person. Our objection to the order made in this cause does not rest only upon the fact that this property was ordered by the Supreme court, acting originally and in a common law proceeding, to be turned

over "to the Receiver *de jure* appointed or to be appointed" in the Stoddard county Circuit court, but that it was ordered to be turned over to any person whomsoever other than the owner of it, the Railway company, plaintiff in error, about whose title there was no dispute. This objection extends to the Receiver referred to("appointed or to be appointed"), but it also embraces all other persons and officers *in esse* or *in posse*. It is a question that does not arise as one under the original jurisdiction in equity of the Stoddard county Circuit court, but solely under the original jurisdiction of the Supreme court of Missouri in a proceeding that was not *in rem.*, nor one wherein there could possibly be any jurisdiction over or control of the railway property.

Our proposition on this head is that the Supreme court of Missouri in a case of *original jurisdiction* in that court, in a proceeding in which there was and could be no issue as to the title of property, and where none was made or attempted, and where there could be no action against the property, it being for a writ of prohibition against the Judge of the court of Common Pleas of Cape Girardeau, by whose order, and whose order only, the Railway company's property has been taken from the owner and placed in the hands of Houck, as a Receiver, the State supreme court first decided that the writ of prohibition should go, because, and solely because, the Common Pleas court was *absolutely without jurisdiction to even entertain the bill* filed for a receiver, the subject-matter therein not being cognizable by a court of equity, and that all its proceedings, from beginning to end, were

null and void; and yet, in addition to prohibiting any proceedings in that Common Pleas court, instead of leaving the property with the Railway company, in whom it was decided the title was, ordered it all in fact to be taken from the Railway company and turned over by the person whose very *office and appointment* had been declared a nullity, to a third person whom the Supreme court adjudged to be a Receiver *de jure* appointed, or to be appointed, by the Stoddard county Circuit court. The property was thus not only taken from the owner, but placed into the hands of another *prejudged* to have a right to its possession by the Supreme court not acting as an appellate tribunal.

This, we maintain, was in violation of the right of the Railway company to its property, was without due process of law, was done by the State of Missouri, and against a person within the meaning of the constitution; that it denied to this company the equal protection of the laws in that State; that the Federal question was raised in the cause, on the record, and the decision was against the right and title of the owner of that property, and, therefore, this Honorable Court has jurisdiction to hear and determine the cause brought here on the writ of error, *and the question, so far from being frivolous, is one of the greatest importance; and both from the fact that it is without precedent of such action in a case of original jurisdiction in a court of last resort in a State, and also because it involves the title and right of possession to a complete railway and all its appurtenances*, it well deserves the

full and usual argument allowed in such cases and the most mature deliberation of this tribunal.

This statement is intended to develop the facts establishing this proposition; and to add somewhat to those set forth in the mover's statement on the other proposition by him discussed. *

The proposition has been very plainly raised; sufficiently not to have been misunderstood, and we shall endeavor to show, too important to be ignored. By reference to the assignment of errors (Extracts, p. 3–4) it will be found that while they are broad enough to cover the point most argued by the defendant in error in the brief upon the motion, now to be considered, the first two errors distinctly draw in question that portion of the judgment of the State Supreme court, which is as follows, and which judgment is incorporated in the *decision* (Extracts, p. 70) and the *writ* of prohibition (Extracts, p. 73). In each it is as follows:

"And you, the said Louis Houck, are hereby commanded to turn over all the property of said Railroad company that has come into your hands as *de facto* receiver thereof under the the orders of said Cape Girardeau court of Common Pleas, to the Receiver *de jure* thereof, who has been or may be appointed by the Circuit court of Stoddard county, in which the suit aforesaid of relator is pending, and that you account therefor to such Receiver under the supervision of said Circuit court of Stoddard county."

In the decision (Extracts, p. 70) it will be found the language of the writ is used, and *this is par-*

*NOTE.—Pages of the "Extracts," from the transcript of record, filed by the defendant in error are referred to, save where mention of the "transcript" itself is specially made.

ticularized nowhere else. The memorandum of judgment (Extracts 57–58) does not extend to and would not justify the language of the writ, and it, itself refers to the opinion, and the writ incorporates the judgment as expressed in the opinion. The opinion in this case, therefore, for these as well for other reasons herein stated further on, not only must be looked into to determine what the action of the State Court was and was intended to be, but it is part of the record absolutely. The judgment of the Court is in the opinion and is the opinion. The opinion in this case is the "*decision*," both within the spirit and the letter of the U. S. Revised Statutes, Sec. 709.

The assignment of errors were in part as follows (Extracts p. 3): * * * * *

II.

"That the Supreme Court of the State of Missouri was without jurisdiction or authority to adjudge and command that the property of said St. Louis, Cape Girardeau & Fort Smith Railway Company, here plaintiff in error, should be turned over to any person or officer, other than said Railway Company, and in so ordering and adjudging in said action said Supreme Court condemned said Railway Company without hearing as to its property and its right of possession thereof, proceeded without inquiry as to the same, and rendered judgment without trial, and deprived said Railway Company of its property without due process of law.

* * * * * * * * * *

V.

"That the Supreme Court of the State of Missouri by commanding the said Houck to turn over all the property of said Railway Company, that had

come into his possession, under the orders of said Common Pleas Court of Cape Girardeau County, to any Receiver, who had been or might be appointed by the Circuit Court of Stoddard County, deprived said Railway Company of its property and the possession of its property without due process of law and in violation of the Fourteenth Amendment of the Constitution of the United States."

* * * * * * * * * * *

It will also be observed that the action brought in the Supreme Court of Missouri was an original proceeding in that Court; it was not upon appeal; but all proceedings were under the jurisdiction conferred upon that Court by the Constitution of Missouri of 1875 (R. S. Mo., 1889, p. 80).

These provisions of this Constitution as to the jurisdiction of the Supreme Court are as follows:

Art. VI., Sec. 2. "The Supreme Court, except in cases otherwise directed by this Constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State under the restrictions and limitations in this Constitution provided.

Sec. 3. "The Supreme Court shall have a general superintending control over all inferior Courts. It shall have power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and other *original* remedial writs, and hear and determine the same."

There are no State statutory provisions regulating proceedings in prohibition and no rules of the Supreme Court especially relating thereto.

The plaintiff in error was united with the other respondents below, who, besides the Judge of the Cape Girardeau Court of Common Pleas and the plaintiff in error, were "Louis Houck, *President of said Railway Company*," as well as Receiver and

other parties interested as mortgagees in said railroad.

The only notice given to the plaintiff in error was by the provisional writ of prohibition, dated July 27th, 1893, which is neither set out nor noticed by the defendant in error in the "Extracts" filed, but which appears in the transcript on file at pages 246-7. This provisional writ was issued by the Chief Justice in vacation and was as follows:

"IN THE SUPREME COURT OF MISSOURI.

To the October Term, 1893.

STATE OF MISSOURI, at the Suggestion and Relation of EDWIN G. MERRIAM,
vs.
ALEXANDER ROSS, Judge of the Cape Girardeau Court of Common Pleas *et al.*

Now, on this the ..... day of July, 1893, comes Edwin G. Merriam, and presents to the undersigned Chief Justice of the Supreme Court of Missouri, in vacation, his suggestion for a writ of prohibition (which suggestion has heretofore been filed with the Clerk of said Supreme Court) to be directed to the said Alexander G. Ross, Judge of the Cape Girardeau Court of Common Pleas, and to Louis Houck, as President of the St. Louis, Cape Girardeau & Fort Smith Railway Company, as well as Receiver thereof, the St. Louis, Cape Girardeau & Southern Railway Company, Leo Doyle, the Mercantile Trust Company and Edward Hidden, prohibiting them and each of them from *further pursuing and holding the cognizance of pleas in a certain cause in said Court,*

wherein the said St. Louis, Cape Girardeau and Fort Smith Railway Company is plaintiff and the said Mercantile Trust Company, Leo Doyle and Edward Hidden are defendants, *the same being a civil action for the purpose of appointing a Receiver of all the assets of the said St. Louis, Cape Girardeau and Fort Smith Railway Company*, and the undersigned Judge having seen and heard the said suggestion and the record filed herewith, on consideration thereof, doth order that the said Alexander Ross, Judge of the Cape Girardeau Court of Common Pleas, and the said Mercantile Trust Company, Leo Doyle, Edward Hidden and the said Louis Houck appear before the Honorable Supreme Court of Missouri on the 10th day of October, 1893, and show cause, if any they have, why a writ of prohibition should not issue as prayed in the suggestion of Edwin G. Merriam.

Witness my hand this the 27th day of July, 1893.

FRANCIS M. BLACK,

Chief Justice Supreme Court, State of Missouri."

This writ was duly served on the respondents, and it was upon this that the respondents were brought into Court and there was no other for that purpose issued at any time.

In the suggestions for prohibition (Extracts 17-18 foot), it is stated:

"And your petitioner further avers that a court of equity has no jurisdiction to entertain proceedings of the nature or character and purposes *set forth in the bill* of said Railway company in the said Cape Girardeau court of Common Pleas, and *that all the proceedings* of the said Cape Girardeau court of Common Pleas are *without jurisdiction and authority*, and are a direct encroachment upon the authority and jurisdiction of this court and are in contempt to this Honorable court, its authority and dignity, and under the constitution and the laws, it is made the

care and custody of this court, that the said Cape Girardeau court of Common Pleas, as well as all other inferior courts, keep within the bounds and limits of their several jurisdictions prescribed to them by the laws of this State."

We hereinafter, more fully than we have above, state our reasons and authorities for reference to the opinion and judgment rendered in this cause, and now present the fact that the judgment in prohibition went upon the ground that the Common Pleas court was not only without jurisdiction, but *that the proceedings in that court were an absolute nullity*. This we do with knowledge of the rulings of this Honorable Court against examining *the opinions of the lower courts to ascertain whether the Federal question is raised, but* with confidence that this court will agree with us, that this is a case in which the federal question has been raised and is inherent, and a view of the opinion is not only proper, but most legitimate and necessary. The opinion is contained in the transcript brought here on the writ of error, and is set forth at length by *defendant in error* in the "Extracts" (pp. 58-70). There were four Judges concurring in this opinion and there were three dissenting (p. 70). Seven Judges constituted the court.

On page 64, Extracts, the Court states the propositions before it to be:

"Is the power and control which the Cape Girardeau Court of Common Pleas has assumed and is exercising over the *corpus* and affairs of St. Louis, Cape Girardeau & Fort Smith Railway Company, through a Receiver appointed as aforesaid, authorized by law, and, if not, has the Court power under the Constitution and the laws to prohibit the further exer-

cise of such control at the instance of the relator, are the principle questions to be determined in this controversy."

Proceeding to the discussion of these questions the opinion states, (Extracts, p. 65):

"The petition filed in the Common Pleas Court is the petition of the Railway Company and sets forth in substance that it possesses certain property which is encumbered in different ways and o secure different amounts and owes defaulted interest and floating debt to a large amount and is insolvent; that certain small creditors are about to institute suit on interest coupons due from your petitioner for the purpose of injuring the same and doing great harm to creditors as a body, which will interfere with the operation of the road and impair the value of the security of the bondholders and other creditors; that the value of the property is such that if handled under the order of the Court it will ultimately pay all liabilities. The Court is thereupon asked to take possession of the railroad and its property through a Receiver, to enjoin all persons from interfering with the same, and to use, operate and control the property for the benefit of creditors, bondholders and stockholders."

And the opinion continues:

"Where, in this paper called a petition, is to be found a cause of action stated against anybody? What wrong is there complained of calling for the exercise of the remedial jurisdiction of a court of law or equity. What right of the petitioner or anybody else for that matter, is there alleged to have been infringed or even threatened? None whatever. The whole scope of the paper is to inform the Judge of the Common Pleas Court in vacation that the Railway Company is in debt, in embarassed circumstances, some of its creditors are about to sue upon its over-due obligations and to pray the court to take charge of the property and to administer it for the benefit of all concerned. In other words, it is simply a petition by a debtor for the appointment of a receiver

to manage and carry on its business so that its creditors cannot enforce its legal rights in the courts of the country, and not a petition stating a cause of action, either at law or in equity, in which as incident thereto a Receiver might be appointed."

The opinion then declares:

"The filing of that petition no more instituted an actual controversy between contending suitors in court than would be the filing of a copy of the Lord's Prayer. It laid no foundation whatever for the exercise of the jurisdiction of the court to appoint a receiver unless some ground for the exercise of that jurisdiction can be found other than an actual pending controversy in the court which undertook its exercise."

The opinion then goes on to discuss certain authorities from the United States Circuit Courts and the Supreme Court of the United States, that the respondents had presented in support of the petition which had been filed in the Common Pleas Court (being those that are commonly known as the "Wabash" cases), and then it is said by the decision (Extracts, p. 67):

"The fact is the Wabash case is *sui generis*. There is no such source of equity jurisdiction as is supposed therein to have been discovered. It is without precedent, and we have found no published case that supports it."

And on page 68 (Extracts), the opinion continues:

"*There being no statutory authority in this state for the appointment of a receiver in such a proceeding, the appointment of Houck receiver by the Common Pleas court was a nullity*" as appears from the foregoing authorities and what has been said, and it follows as a consequence that his appointment is subject to collateral attack." (The italics are our own).

The opinion then discusses the right of the relator to make the attack, *and in this relation and this relation only considers it*, and concludes as follows:

"The writ of prohibition as prayed for should go. The ground upon which this conclusion has been reached obviates the necessity of discussing the many questions raised and argued by counsel, growing out of the action of the parties and the courts after these two proceedings were commenced, none of which go to the question of *jurisdiction upon which this case turns*.

"It is therefore ordered that the writ of this court issue prohibiting the said respondent Ross, as Judge of the Common Pleas court aforesaid, from entertaining any further pleas or taking any further judicial action in said so-called suit entitled 'The St. Louis, Cape Girardeau and Fort Smith Railway Company against Leo Doyle, Ed Hidden and The Mercantile Trust Company of New York, in said court of Common Pleas, and prohibiting the other respondents from further prosecuting any further pleas therein, and commanding the said *Houck* to turn over all the property of said Railroad Company that has come into his hands as *de facto* receiver thereof under the order of said Common Pleas court, to the receiver *de jure* thereof who has been or may be appointed by the Circuit court in which the suit aforesaid of relator is pending, and that he account therefor to such receiver under the supervision of said Circuit court."

The memorandum of judgment with which this opinion was filed reads as follows (Extracts, pp. 57–58):

"Now at this day come again the parties aforesaid by their respective attorneys, and the Court here being now sufficiently advised of and concerning the premises doth consider and adjudge that the writ of prohibition as prayed for by the relator herein be, and the same is hereby granted, and that the relator

recover against the said respondents his costs and charges herein expended and have therefor execution. (Opinion filed)".

What was "prayed for" is declared in the opinion and nowhere else.

There was no other authority for the writ and order issued. But the Court refused to modify the same, as prayed on motion for rehearing.

There was no notice or intimation given by the Court that any other than a writ of prohibition, in usual form, against the exercise of jurisdiction, was to be adjudged and issued in any event.

As we have above stated, this was a case of original jurisdiction in the State Supreme Court which sat at Jefferson City, far from the residence of the litigants, and which Court was day by day engaged in hearing and deciding cases on appeal, and but little prepared or organized to try a lawsuit, like an ordinary court at *nisi prius*. It had had before it, as the record here shows, a cause involving the same subject-matter between the same parties substantially, upon a proceeding, also of original jurisdiction in that Court for *mandamus*, and in fact in that proceeding praying for the very order now made, but which was then, and in that case refused.

State *ex rel.* vs. Ross, Judge, 118 Mo., R. p. 23.

Within the time allowed by law and the rules of court, the respondents filed a motion for a rehearing and to modify judgment (Extracts, p. 71). Among

other reasons stated in this motion are to be found the following:

"The respondents particularly ask for a rehearing and annulment of that part of the order in this cause which reads as follows: 'And commanding the said Houck to turn over all the property of said railroad company that has come into his hands as *de facto* receiver thereof under the order of said Common Pleas Court to the receiver *de jure* thereof, who has been or may be appointed by the Circuit Court in which this suit aforesaid of relator is pending, and that he account therefor to such receiver under the supervision of said Circuit Court,' for the following reasons:

"*First.* Said order is founded upon a proposition which has not been argued before the Supreme Court in this cause.

"*Second.* It is against all authority.

"*Third.* It is inconsistent with the opinion of the court which holds the appointment of Louis Houck void as receiver and yet assumes to command him as such officer to do certain acts and to account for his acts as an officer . . . . . .

"*Fourth.* The order and command is in violation of Article 2, Section 30, of the Constitution of the State of Missouri, which provides that no property shall be taken without due process of law.

"*Fifth.* That part of the order above quoted is in violation of Article 5 of the Amendment of the Constitution of the United States, which provides that no person shall 'be deprived of life, liberty or property without due process of law,' and of the provisions of the first section of the Fourteenth Amendment of the Constitution of the United States, which provides that no State shall 'deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.'

"The order is in reality not prohibition, but mandamus."

There are other reasons set forth in the motion for rehearing, which are pertinent to an argument on

the merits but not deemed essential to the present statement. This motion was denied by the Court (Extracts, p. 74); and a petition for writ of error presented, and writ of error allowed upon briefs filed. (Transcript, p. 673).

The writ of error was approved by Chief Justice Francis M. Black (Extracts, p. 75), of the Supreme Court of Missouri—the justice who had issued the provisional writ of prohibition.

The assignment of errors was filed, and upon supersedeas bond the cause thus came to this Honorable Court.

BRIEF, POINTS AND AUTHORITIES.

We maintain that this cause contains within it not only a federal question, but two as important ones as can arise in this Honorable Court.

I. The federal question was raised in the Supreme Court of Missouri, and appears so to have been done in the record of that court.

We have set forth in our statement the record at sufficient length, in connection with the statement of the defendant in error, to show that:

1st. The Supreme Court of Missouri was proceeding in this action as a court of original, and not appellate jurisdiction.

Const. of Mo. (1875), R. S. Mo., 1889, p. 80, quoted in statement.

See also opinion delivered in this cause (Extracts, p. 68); also State *ex. rel.* Macklin vs. Rombauer, 104 Mo., p. 624, by Barclay, J.

2nd. That the provisional writ of prohibition which was the only notice served, stated the suggestion of relator was for a writ of prohibition to be directed to respondents, "prohibiting them and each of them from further pursuing and holding cognizance of pleas in the Common Pleas Court, and ordering them to appear and show cause why a writ of prohibition should not issue as prayed.

(See writ as set forth in above statement.)

3d. That under this summons, and the petition for prohibition filed, there was a trial upon the question of jurisdiction of the Court of Common Pleas, and upon due inquiry the Supreme Court adjudged that court to have been without the semblance of jurisdiction, and all its action was void; that "the appointment of Houck receiver by the Common Pleas Court was a nullity." (Extracts, p. 68.)

4th. That the only question that was involved in the cause was whether the Supreme Court of Missouri could and should prohibit the Common Pleas court from entertaining any pleas of respondent therein, or otherwise attempting to exercise any jurisdiction in the cause there pending, wherein the Railway company was plaintiff.

This was the position taken in the relator's suggestion. (Extracts, pp. 17–18.)

This the court expressly states in its opinion as quoted above. (Extracts, p. 64.)

5th. That there was no issue presented, argued, or that could have been anticipated as to whether, if the Common Pleas court had absolutely no jurisdiction whatever to receive the bill in equity, or make any order thereon, the Supreme court of Missouri in this proceeding, upon arriving at that conclusion, could or would order the railway, the property of the plaintiff in error here, *to be turned over to a third party*—to the Receiver appointed or to be appointed in the case of the relator in the Stoddard county Circuit court, or any one else.

The only purpose of a discussion of the relator's cause, in the Stoddard county Circuit court, and the

proceedings there had, was to meet the objection that the relator had no standing in the Supreme court to question the jurisdiction of the Common Pleas court. The Supreme court in this cause so states in its opinion. (Extracts, p. 69.)

6th. That as soon as this order was made, the plaintiff in error here, by the only means that was possible, and in accordance with the rules of the Supreme court of Missouri, raised the question of its (the Supreme court's) own jurisdiction and power under the Constitution of the United States to make the order, as is above fully shown, and has preserved that question by due assignment of error and appropriate proceedings, which are not in themselves here questioned.

7th. That the authorities cited by the defendant in error on the motion to dismiss are not applicable to the present case. They are all upon cases that came to the upper state courts upon appeal, and where there was opportunity to have presented the constitutional question, before the decision.

8th. It is apparent that if the plaintiff in error is being deprived of its property without due process of law, or being denied the equal protection of the laws, because of the order of the Supreme court directing its property to be turned over to a third person, and that no such order was to be anticipated in such form as that the constitutional provision could have been previously asserted against it, that this Honorable Court will not allow the U. S. Constitution to fail of effect, because the State court has so acted that the question could not be raised within the

letter of previous decisions made under and applicable only to cases of an entirely different nature.

9th. If the Federal question could not be raised in this case, being one of original jurisdiction in the State supreme court, before the order and no opportunity was given to raise the question, previous to the order itself, and it was first raised on a motion for rehearing, we submit this Honorable Court will not surrender its control over such question it raised as soon as possible. We claim the State court not only violates the fundamental rights of property, but does it at a point in the proceedings and in a manner so unexpected as to have not elicited previous objection, and so that there can, otherwise, be no sufficient appeal.

10th. *But there is abundant authority to sustain the jurisdiction of this Court in this cause, without reference to the motion for a rehearing.*

a. It appears unmistakably from the record, that the State Supreme Court knew, or ought to have known, that the Federal question was involved in the decision made.

In such case, this Honorable court has jurisdiction. This proposition is supported directly in Brown vs. Colorado, 106 U. S., 95.

It is sufficient if it appears from the record that the question was necessarily involved in the decision, and that the State Court could not have given the judgment or decree which they passed without deciding it.

Armstrong vs. The Treasurer of Athens, 16 Peters, R., 281.

It is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms—*ipsissimis verbis*—but it is sufficient if it appears by clear and necessary intendment that the question must have been raised and must have been decided in order to have induced the judgment.

Crowall vs. Randall, 10 Peters, R. 368–398.

It appears clearly from the record that the provision of the United States constitution was relied on by the Railway company and it has been denied, within the rule laid down in Bridge Proprietors vs. Hoboken Co., 1 Wallace, 116–143.

Beer Co. vs. Massachusetts, 97 U. S., p. 25.

Johnson vs. Risk, 137 U. S., p. 307.

The case here is analogous to those in which this court has held that where the construction of a statute by a state court violates the plaintiff's contract, there would be no relief except in this court, and that "this court will not be discharging its duty to see that no state legislature shall pass a law impairing the obligation of a contract unless it takes jurisdiction of such cases."

Bridge Proprietors vs. Hoboken Co., 1 Wallace, 116–144.

Mobile & Ohio R. R. vs. Tennessee, 153 U. S.. 486–493.

This Honorable Court has itself recognized that when for the first time the Federal question can be raised, it is on the judgment of the Supreme Court of

a State, it may be then done and should be set up and interposed when the decree in the Court of last resort is rendered.

Loeber vs. Schroeder, 149 U. S., 580–585.

See the next to last paragraph of the opinion.

b. Although this Court decided that the opinions of state courts, other than those of Louisiana, could not be looked into to ascertain what was decided before the restriction of the act of 1789 was removed by the act of 1867, it has since then said, there is no reason it should not so far examine those opinions, when properly authenticated, as may be useful in determining the question.

Murdoch vs. City of Memphis, 20 Wallace, 590–633.

In the present case this Court finds the judgment itself in the opinion, which alone contains the order complained of here, and which is incorporated in the writ issued.

See foregoing statement.

c. In deciding that all the proceedings in the Common Pleas were absolutely without jurisdiction, and that the appointment of Houck was a nullity, the State supreme court left itself without the least jurisdiction or authority to make any further order against Houck "as a receiver *de facto*," as it denominated him, and requiring him to turn over the property of the Railway Company, to any other person. It did

not act upon an *officer*, because it itself had declared there was no such *office* created or officer appointed; that the attempt was a nullity.

The office of receiver could not be created by a court utterly without jurisdiction to entertain the bill; it was the same as if it had been attempted in an action at law in a court that had no authority or jurisdiction to entertain proceedings in equity. Where there is no office there can be no officer, either *de facto* or *de jure*, any more than there can be of an office attempted to be created by an unconstitutional law.

A Court, without jurisdiction to the extent declared by the opinion in this case, like an unconstitutional law, "confers no rights, imposes no duties, affords no protection, creates no office;" its orders are, in legal contemplation. as ineffective as though they had never been made.

This proposition is fully illustrated in Norton vs. Shelby County, 118 U. S., 425, 441, 442.

Ex parte Snyder, 64 Mo., p. 62.

d. The result of the decision of the State court, was to leave the property with plaintiff in error, where it had been all the time in legal contemplation—that is, with its owner.

Frankel vs. Satterfield, 19 Apl. Rep. (Del.), 900.

Black Judgments, Sec. 278 and Note 186.

Ry. Co. vs. Reynolds, 89 Mo. R., p. 147.

Taylor vs. Todd, 48 Mo. App., p. 555.

McClanahan vs. West, 100 Mo. R., 309-323.

Vanfleet, on Collateral, Attack, Sec. 16.

Black Law Dict., p. 1038. Title "Restitution."

c. By the order made for Houck to turn over all the property to the Receiver *de jure* thereof, who had been or might be appointed by the circuit court of Stoddard County, or any other person, or officer, the State supreme court was not acting within the constitutional limitations of its own jurisdiction.

By the Constitution of Missouri it was limited to appellate jurisdiction except in cases where it might issue original remedial writs, and hear and determine the same.

There being no State statute relating to such writ, it was left as at common law.

State *ex rel.* Macklin vs. Rombauer, 104 Mo., pp. 622 and 624.

State *ex rel.* vs. Mason, 77 Mo. R., 189–191.

Smith vs. Whitney, 116 U. S., 167–174.

The only statute relating to procedure in Missouri effecting writs in prohibition, is the statute of jeofails, Mo. R. S. 1889, Sec. 2 116.

State *ex rel.* Macklin vs. Rombauer, 104 Mo., p. 622.

There can be no trial in a prohibition proceeding of either the title or the right of possession.

"Prohibition proceedings are in no sense a part or continuation of the action prohibited by removing it

from a lower to a higher Court for the purpose of obtaining a decision in the latter tribunal. It is intended alone to arrest that proceeding and prevent its further prosecution by a Court having no jurisdiction of the subject-matter in dispute."

High on Extraordinary Legal Remedies, Sec. 768, page 554.

"Prohibition is a remedy provided by the common law against the encroachment of jurisdiction; being a preventive rather than a remedial process it will not operate to restrain the party named therein generally, or from doing any act save proceeding in the suit or matter."

American & English Encyclopædia of Law.

"Prohibition," Vol. 19, page 234 *et seq.*

High on Extra Legal Remedies, § 766.

Thomson vs. Tracy *et al.*, 60 N. Y., p. 37.

Hudson vs. Superior Court, 42 Mich., 239.

II.

The judgment denies to the Railway Company the equal protection of the laws.

First. It prejudges the merits of the cause pending in the Stoddard county Circuit court, in that, without having that cause before it on appeal, it decides that there is or may be a receiver appointed therein who is or will be *de jure*, and that he must be recognized as such, and must be accounted to for the Railway Company's property ordered to be turned over to him.

These very parties in regard to the same snbject-matter had litigated in ihe Supreme Court of Missouri the title and authority of any receiver appointed in the action brought by Merriam, the relator, in the Stoddard County Circuit Court, in a proceeding in mandamus, in which proceeding and in which proceeding only, such title could be tried in the Supreme Court, and the Supreme Court had then and in that case decided against the relator's title, and refused the very order and writ of mandamus that it now annexes to and makes a part of the writ of prohibition, in this proceeding where the title was not tried and could not be.

State *ex rel.* Klotz vs. Ross, Judge, 118 Mo., R., p. 23.

That case appears in the record in this case.

In that case where the Court had jurisdiction, the order was refused which is now made in a case where there was no jurisdiction to make it.

Under this order the Railway Company though a party cannot raise the question of the legality of the receiver's appointment by the Circuit Court of Stoddard County, the Supreme Court having already determined it, and further decided that Houck must account to him.

This is a deprivation of a right of freely contesting in the court below, which is of original jurisdiction in such matters, the very rights and proceedings thus prejudged and determined.

Second. And it has in the present cause refused to recognize the jurisdiction conferred upon the Com-

mon Pleas Court by a cross-bill filed therein by a mortgagee asking for and confirming the receivership of Houck. See the answer of Doyle, trustee, to amended bill in Common Pleas, Transcript, p. . This is omitted from the Extracts printed by defendant in error, and not decided by the State Court, although set up in respondent's return to petition for prohibition (Extracts, p. 27), and it is not even claimed this was stricken out. The State Supreme Court considered, apparently, that its decision that the court of Common Pleas had no jurisdiction whatever, rendered it unnecessary that it should discuss the effect of the mortgage trustee's cross-bill.

Yet, in Boland vs. Ross, 120 Mo. R., 208, the State supreme court has decided that a cross-bill by a defendant will not only confer jurisdiction on the lower court to hold the plaintiff, but to hold even a co-defendant against whom it is admitted the plaintiff *had no cause of action*. This case was decided February 13th, 1894, but a short time before the decision in this case, and remains as the law of the State.

In the present case the cross-bill filed by Doyle as trustee of a deed of trust on the whole railway of ninety-three miles, is ignored, and the property ordered to be turned over to a receiver in a proceeding based upon mortgages admitted to be on only twenty-six miles of the road.

III.

In the discussion of the other point mentioned in our statement above, that the State Supreme Court

not only struck out of the answer of the Railway Company that portion which assailed the jurisdiction of the Stoddard County Circuit Court and any authority asserted by it to appoint a Receiver over any of the railway not contained within the grant of the deeds of mortgage under which the relator Merriam claimed, the defendant here, in his motion, rests first upon the point that no exception was preserved to this action of the State Supreme Court, and thereon the federal question is not raised; and, second, that the Federal question, if preserved, is, in the language of the rule of this Honorable Court, "frivolous."

Against these positions we present the following points:

1st. That the fact that the mortgages under which relator claims, and the extent of the railway over which the Stoddard County Circuit Court undertook to exercise jurisdiction and to appoint a Receiver, are shown by the record, and asserted in the prohibition proceeding by the relator himself.

In the suggestions for a writ of prohibition (Extracts, p. 5), he states:

"That the St. Louis, Cape Girardeau and Fort Smith Railway Company is a railway corporation duly organized as such under the laws of the State of Missouri, and *owned and had*, prior to the 4th day of March, 1893, operated a line of railway extending from the City of Cape Girardeau, in the county of Cape Girardeau and State of Missouri, thence in a southwesterly direction, into and through the county of Stoddard, thence into and through the county of Wayne and thence into the county of Carter, as far as the Town of Hunter therein, being in length about ninety-three miles, and all in the State of Missouri."

And (Extracts, p. 6), it is stated that the relator is the holder of twenty-seven of the $100,000 of bonds under the mortgage of September 1st, 1880, and $49,200 of the $80,000 of bonds secured by the mortgage of July 18th, 1881.

And on pages 5, foot, and 6, top, again it is averred by relator:

That the mortgage of September 1st, 1880, was on that part of the road between the cities of Cape Girardeau and Delta, which distance is shown in bill of Merriam (Extracts, p. 7), to be fifteen miles, and that the mortgage of July 18th, 1881, was on that part of its line between Delta and Lakeville, in the County of Stoddard, a distance of about ten or eleven miles.

The other bonds and mortgages mentioned in connection with these in the same paragraph are those under which the reletor held nothing whatever.

So that it distinctly appears that all the bonds, of which the relator held only a part, were secured by mortgages on only fifteen miles and eleven miles; that is, twenty-six miles of the whole road, which was ninety-three miles in length. And relator's suggestion shows (Extracts, p. 9), that plaintiff in error had executed its consolidated mortgage covering this entire road, and that the relator held and claims to hold nothing under this consolidated mortgage.

These facts further appear in the answer of the respondent Railway Company (Extracts, p. 22, 3d paragraph).

And in this answer this same respondent further denies (Extracts, p. 24, near foot), "that the action of said judge in making said appointment (of

Receiver) was such as he, said Judge, might lawfully do under the practice in chancery or under the statutes of this State." * * *

And it is in connection with a renewed averment of these same facts as to length of road covered by mortgages securing relator's bonds being only twenty-six out of the ninety-three miles of the whole road, that the respondent makes the further averment and claim (which latter *only* is quoted in the defendant's in error statement), Extracts, pp. 31 and 32, as follows:

"That any action by said judge of the Circuit court of Stoddard county, or by said court itself attempting to seize out of the possession of respondent under either of said individual mortgages all of said railroad, or any other part thereof than that expressly named in said divisional mortgages was, and is and must be against the contract expressed in said last-named mortgages, and against the express provisions of both the Constitution of Missouri and the Constitution of the United States, providing that no person shall be deprived of property without due process of law and is against the express law of the land."

The defendant in error claims this was stricken out.

To show this, however, he must resort to the record. The above averment and the *facts supporting it*, is in the answer as it stands, and is presented in the record. It must be some other part of the *record*, therefore, that strikes it out. The defendant in error sets out what he claims to be this other part of the *record* (Extracts, pp. 44–49), and states this as taken from "record, p. 369." If this last is not

the *record*, the answer stands as the only record to be considered by this Court, and it raises the question. If it is the *record* no "objection or exception" is necessary to make it such, and the *only purpose of an "exception" would have been to make it a part of the record.* This is the sole purpose of an exception and a bill of exceptions. Either way, then, it appears of *record*, that the plaintiff raised the Fed-ederal question on the right to turn over the railway to any Receiver in the Stoddard Circuit Court.

Exceptions are not necessary where the record itself shows the matter and the decision of the Court thereon.

Hamlin vs. Reynolds, 22 Illinois R., 207.

Fields vs. Maloney, 78 Mo., 172.

Under the Statutes of Missouri and the rulings of the Supreme Court of the State a motion to strike out material defenses of an answer is taken as a demurrer and part of the record, and no exception is necessary to save it.

Paxon vs. Talmage, 87 Mo., pp. 15 and 16.

Paddock vs. Somes, 102 Mo., p. 235.

Errors apparent in the record are open to review without a bill of exception.

Coughlin vs. District of Columbia, 106 U. S., p. 7–11.

Ins. Co. vs. Piaggio, 83 U. S., p. 378–386.

There is no pretence that the respondent consented to the order striking out. This consent would have to appear affirmatively.

But the defendant in error in his motion and argument, wholly overlooks the further fact that by the decision granting the writ of prohibition, Houck (not as president or receiver, but Houck, the individual), is ordered to turn over all the property, which is described as that which may have come into his hands as *de facto* receiver, to the receiver *de jure*, thereof, who has been or may be appointed by the Circuit Court of Stoddard County, in which the suit aforesaid of relator is pending and that he account therefor to such receiver under the supervision of said Circuit Court of Stoddard County.

By this order, which is of the Supreme Court of the State, the property is not only transferred to the custody of another and inferior tribunal, but it is sent with a judgment that that inferior tribunal has a receiver *de jure* and of such authority that he must be accounted to for the property. The Stoddard County Circuit Court does not take the property *by its own order* but with an *affirmance* by the Supreme Court of any order it has made or it may hereafter make, as lawful and within its jurisdiction, without any possibility of the owner of the property having a trial in that inferior tribunal as to all orders it has made or may make affecting the receivership or the property, as a court of original jurisdiction.

The action of the Supreme Court, therefore, not only deprives the owner of the possession of the whole railway at the instance of one who confessedly

has no deed or contract giving him any interest in any more than a part thereof; but takes from the owner the opportunity of litigating freely in that inferior court his right of property and possession.

"A sentence of a court pronounced against a party without hearing him or giving him any opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

Windsor vs. McVeigh, 93 U. S. Rep., 277.

Salling vs. Johnson, 25 Mich., p. 492.

People vs. O'Brien, 111 N. Y., p. 62.

Stuart vs. Palmer, 74 N. Y., 184.

Devoe vs. Ry. Co., 5 Paige, 521.

The Circuit Court of Stoddard County has original jurisdiction to assert and enforce its own orders, and it is violative of the owner's right of property for the Supreme Court of Missouri to prevent him, as it does by this order, from questioning the legality of the inferior court's action in any part of its proceedings. The Supreme Court exceeds its own jurisdiction in so doing, and does it to the deprivation of the owner of his property, without redress save in this the Supreme Court of the United States.

This action of the State Supreme Court is as far as can be, from any action by courts of *original jurisdiction in equity*, taking into the custody of the law property by appointing a receiver.

The State Circuit Court would violate the provision of the U. S. Constitution in question, by appoint-

ing a receiver for the whole road, under a bill on mortgages granting but a fourth part of the line.

Mays vs. Rose, Freeman R. (Miss.). 730.

The plaintiff, to authorize a receiver, must show either a clear right to the property, or that he has some lien on it, or that it constitutes a special fund for his satisfaction.

Judge Buckner, in Mays vs. Rose, *supra*.

Chicago *et al.* vs. U. S. etc. Co., 57 Pa. St., R. 91.

Pullan vs. Cincinnati etc. Co., 4 Biss. (U. S.), R. 50.

Clark vs. Mitchell *et al.*, 64 Mo. R., 564.

Cooley's Constitutional Limitations, *355, *363 and notes.

This, we submit, is a judgment depriving the company of its property and the use of its property, by the State, the Supreme Court of Missouri. All precedents fall short of such a proceeding, and we claim it is no frivolous question, but one upon which the plaintiff in error is entitled to a full and usual hearing upon his writ and appeal to this Court of last resort.

IV.

The plaintiff in error, the Railway Company, is a person within the meaning of the Fourteenth Amendment of the U. S. Constitution.

Minneapolis etc. Co. vs. Beckwith, 129 U. S., 26–32.

V.

The State within the meaning of the Fourteenth Amendment may act by the judicial department as well as through the executive or legislative.

Virginia vs. Rives, 100 U. S., 313-318.

ARGUMENT.

Having with much peculiarity, in our foregoing statement and brief, set forth our propositions and authorities we do not feel justified upon a motion of this character to make an extended argument.

We submit that enough has been shown to exhibit to this Court that the plaintiff in error has been subjected to most unusual treatment in the lower court. That when the right of a receiver in the Stoddard county Circuit court was in question in the State Supreme Court, an order to turn over the property to him was refused; and that when it was not in question, as to the right of possession, it was granted. That the owner of the property has at every step of the proceedings raised the Federal question, by answer, by motion and here by assignments of error. And in addition tendered payments of the debt in two courts as the record shows. That the only frivolous position taken in this case is that of the defendant in error in attempting to maintain that the Federal question has not been raised. He cannot, although he seems not to perceive that he cannot, get rid of the question without striking out parts of the record. Yet the very act of the Court in striking out a part of the record, he himself has to rely on as of record. It certainly cannot be seriously urged that the purpose of objection or exception at a trial is necessary for any other purpose than to make that a matter of record, which would otherwise not be so, by a bill of exceptions; or

that either, under the laws of the State of Missouri, which became a part of the proceedings in this case, or indeed under any system, the action of a Court in striking out an answer, or part of an answer, must be preserved by a bill of exceptions, any more than it would be as to the Court's action on demurrer. The precedents and reason are against any such position. If a motion is itself based upon so frivolous a position, he who presents it ought not to be countenanced by hearing on the merits, to the least degree. He *presumes* we are seeking delay, which we deny. It is apparent he is urging undue haste on insufficient grounds. Neither does the defendant in error seem to perceive (he certainly does not discuss) the proposition, that the order of the Supreme Court of the State, in a case of original jurisdiction, pre-judges questions vital to the owner's right to the possession of his property, that can be raised legally under the law of the land, only upon appeal to that court in due course. It needs not even constitutional provisions to declare that such right of property and possession cannot be invaded without trial or decided without hearing. Where can we find a more learned discussion of these primordial rights than in the brief the learned and eminent leading counsel, signing the present motion, filed in this Honorable Court in the case of the Mercantile Trust Company against the Texas and Pacific Railway Company, John H. Reagan and others, Railroad Commissioners, and the State Attorney General (154 U. S. Rep., 362–378), unless it be in the decisions of this Honorable Court, in the Minnesota

case, 134 U. S. Rep., 458, by him cited in that brief, and others decisions of this Court since made.

Barbier vs. Connolly, 113 U. S., p. 31.

Surely we may claim that to deprive a railroad company of its power to charge reasonable rates for the use of its property, in the absence of an investigation by judicial machinery, is no more to deprive it of the lawful use of its property and thus in substance and effect, of the property itself, without due process of law and without the equal protection of the laws, than it is to take the very railroad itself bodily and transfer it to another.

With such a question and such authorities in support of it, we claim for the plaintiff in error the right to be fully heard in usual course of proceeding in this Honorable Court.

We also feel we are entitled to claim that we should be allowed an oral argument upon this motion itself, if the Court is in doubt, to the least degree, upon our position upon the merits. We cannot believe it will be here decided that the Federal question has not been raised upon the record in this case; and we cannot believe that in this case the merits will be decided against the plaintiff in error without the freest and fullest discussion.

JOHN W. NOBLE,
MADISON R. SMITH,
Counsel for Plaintiff in Error.